Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

TOMMY R. SCHROEDER,

Petitioner,

v.

HAMILTON SCHOOL DISTRICT, GARY AMOROSO, DEAN SCHULTZ, RICHARD LADD, KATHLEEN COOKE, KEITH HICKLIN, and PATTY POLCZINSKI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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67 pp

QUESTIONS PRESENTED

1. May a public entity constitutionally rank groups by size and give more, rather than equal, protection to members of bigger groups?

2. May a plaintiff who brings an action alleging unconstitutional employment discrimination under the Fourteenth Amendment's equal protection clause use the same proofs and legal analysis as are used in cases brought under Title VII of the Civil Rights Act of 1964, as amended?

3. Does the Seventh Circuit's decision run afoul of this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996) when the decision allows "saving money" as a rational basis for denying equal protection?

4. May a court decide constitutional issues based on sociological speculation, rather than facts?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tommy R. Schroeder respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on March 11, 2002.

OPINIONS BELOW

The March 16, 2001, decision of the district court, which is not officially reported, is set out at pp. 27a-48a of the Appendix. The district court granted summary judgment to the defendants and denied plaintiff's motion for summary judgment as moot.

The March 11, 2002, decision of the court of appeals, which is reported at 282 F.3d 946 (7th Cir. 2002), is set out at pp. 1a-26a of the Appendix to this petition. Contained in that decision are the majority opinion (Manion) at pp. 1a-16a, a concurring opinion (Posner) at pp. 16a-20a, and a dissent (Wood) at pp. 21a-26a. The majority affirmed the district court's grant of summary judgment to the defendants.

A petition for rehearing or rehearing en banc was denied May 17, 2002 and is set out at p. 49a of the Appendix.

JURISDICTION

The district court had jurisdiction of this action pursuant to 28 U.S.C. §1331. The magistrate judge acting under consent given pursuant to 28 U.S.C. §636(c)(1) denied summary judgment to petitioner and granted summary judgment in favor of respondents. Final judgment was entered under Fed. R. Civ. P. 54(b).

An appeal was taken to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. §1291. The judgment of the court of appeals was entered March 11, 2002. Petitioner filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The court of appeals denied the petition May 17, 2002.

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United State Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

Section 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of ay rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief

shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

INTRODUCTION

In this case, Plaintiff-Appellant, Tommy Schroeder ("Schroeder") filed suit against the defendants pursuant to 42 U.S.C. §1983 because the defendants violated his right to equal protection under the law. Specifically, the defendants allowed students, staff and parents to harass him on the basis of his sexual orientation while he was employed as a teacher at the Hamilton School District ("HSD") outside of Milwaukee, in the State of Wisconsin. (R.Doc. 1, pp. 10, 15-16).

Schroeder taught at the HSD for 22 years. Starting as early as 1989, Schroeder endured death threats and verbal assaults. In 1989, an eighth-grade student told Schroeder he was a "stupid faggot" and that he "was going to blow [Schroeder's] fucking head off." (R.Doc. 98A, pp. 66-68). In 1996, another student said he was "... going to kill Mr. Schroeder" that "stupid queer." (R.Doc. 98A, pp. 12-15, Ex. 3 and pp. 71, 74-75). In 1995, Schroeder was physically confronted by one student, large for his age, who called Schroeder a "faggot" and said: "How sad there are ANY gays in the world." (R.Doc. 98A, pp. 12-15, 177-179 and Ex. ##3, 160(2nd page); R.Doc. 98 (Loreenz Dep. pp. 64-70).

Starting as early as 1993, Schroeder also endured hateful graffiti: In 1993, Schroeder found graffiti in the boys bathroom that said "Schroeder is a faggot" (R.Doc. 98A, pp. 12-15, Ex. 3) and in 1994, one bathroom was graffiti-bombed with graffiti on every surface of the bathroom saying "Schroeder sucks big cocks" and "Schroeder is a faggot." (R. Doc. 98A, pp. 12-15, 163-64; R.Doc. 98A, pp. 154-66; R. Doc. 98G, pp. 35, 75-79, 121-22).

From 1994 through 1996, Schroeder endured students taunting him by shouting "faggot" or "queer" out in the hallways during breaks in classes, in the lunchroom, on the playground, in his own classroom and during mandatory bus duty assignments. (R.Doc. 98B, pp. 34-42, 75-81, R.Doc. 98G, pp. 75-86, R.Doc. 98 (Norene Dep., p. 70-74); R.Doc. 98 (Lorenz Dep., pp. 77-80); R.Doc. 98C, pp. 212-20, 245-64, 277-95, Ex. ##149-152, 154, 168-69, 171).

From 1994 through 1998, Schroeder endured phone messages left at home and school from students chanting obscenities like "faggot, faggot, faggot" or baiting him with questions like "do you suck cock?" and "are you a faggot?" (R.Doc. 98A, pp. 12-15, 142-43, 314 , 329 and Ex. 48, p. 3; R.Doc. 98C, pp. 227-29, 253, 292, 304-05; R.Doc. 98, Exh. #3).

From 1995 through 1998, Schroeder endured hateful comments from parents. One parent physically confronted Schroeder and said to his face: "I don't want queers teaching my son." (R.Doc. 98A, pp. 12-15, Ex. 3 and p. 144). Another parent in 1997 was heard accusing him of sexually abusing small boys. (R.Doc. 98A, pp. 273-283, 299; R.Doc. 96; R.Doc. 98E (Curtis Deposition, p. 13-14)). Another parent called Schroeder anonymously and said "faggot, stay away from our kids." (R.Doc. 98A, p.142). And yet another parent called anonymously to tell Schroeder: "we just want you to know, you fucking queer, that when we pull out all of our kids, you will have no job." (R.Doc. 98A, p., 145). In 1997, a memorandum was circulated among parents and staff which began as follows: "Schroeder openly admitted at a district meeting that he was homosexual. Is that a good role model for our 5, 6 and 7 year old children?" (R.Doc. 98A, pp. 192-95, Ex. #16).

During all these long years of abuse, despite undisputed knowledge of the abuse, the Defendants did not protect Schroeder and were intentionally indifferent to his suffering. Schroeder requested transfers from the Middle School, but the transfer requests were refused. (R.Doc. 98A, pp. 12-15, 171-74; Ex. 3). The District "blamed the victim" and said "boys will be boys" and "you'll just have to ignore it." (R.Doc. 98 Ex. #39, R.Doc. 98C, p. 279). The Defendants did

not even protect Schroeder when the abuse happened in front of District Administrators. For example, when one of the student who had made a death threat was in Assistant Principal's office, the student again physically confronted Schroeder and angrily demanded: "Well, are you a queer?" (R.Doc. 98A, pp. 12-15, Ex. 3). The Administrator did not protect Schroeder, cut short the confrontation, or discipline the student. In fact, the Administrator later turned on Schroeder and demanded to know why he had taken notes during the meeting and angrily shouted: ".... there is not going to be any legal action ...." (R.Doc. 98A, pp. 12-15, Ex.## 3, 160(2nd page); R.Doc. 98C, pp. 271-74). Among many other things, the District refused to publicly repudiate the Memorandum that suggested that gays/lesbians were not "good role models" for elementary students. (R.Doc. 98E, pp. 165-184).

In fact, Schroeder's direct supervisors were so completely and recklessly indifferent to the daily abuse that Schroeder was suffering that they only informed the Superintendent of the abuse *three years after* the abuse started and, then only at the insistence of the Teachers' Union. (R.Doc. 98C, pp. 236-238; see also R.Doc. 98F, pp. 124-25, 155, 163, 177, 207; see also R.Doc. 98E, p. 41; R.Doc. 98F pp. 164, 210). In fact, far from defending Schroeder and preventing the abuse, Schroeder's then-Principal, threatened to institute "proximity supervision" of Schroeder's male students. "Proximity supervision" was a code phrase for not allowing Schroeder to be alone with male students. (R.Doc. 98A, pp. 295-97). The District also allowed at least one student to be removed by the student's parents from Schroeder's classroom because he was gay. (R.Doc. 98 Ex. #19, R.Doc. 98B, pp. 72-74, 84-85, 100-101).

As a result of these years of abuse, in February 1998, Schroeder suffered a mental breakdown and was forced to leave his teaching job. Schroeder has been unable to work since that time and is now on disability.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON AN IMPORTANT MATTER.

The case at bar is one where the §1983 violation is employment discrimination akin to the kinds of discrimination that violate the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1), et. seq. ("Title VII"). *See, Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The Seventh Circuit declined to use Title VII analysis in Schroeder's case. App. p. 7a. The Supreme Court has not directly addressed the interaction between §1983 and Title VII. However, there is significant authority for the principle that Title VII analysis should be applied in §1983 cases based on employment discrimination. See, Judge Charles R. Richey, *Manual on Employment Discrimination and Civil Rights Actions*, §4.37 (§1983 and Employment Discrimination) and §4.85 (Burdens of Proof (in §1983 employment discrimination actions)) (2d ed. 1988, 2002 update).

At least five Circuits apply Title VII analysis and caselaw in §1983 cases where the claimed Equal Protection violation is employment discrimination. For the Eleventh Circuit, *Harris v. Shelby County Board of Ed.*, 99 F.3d 1078 (11th Cir. 1996), states plainly "[w]e evaluate Title VII and 42 U.S.C. §1983 race discrimination claims supported by circumstantial evidence using the framework set out the United States Supreme Court in *McDonnell Douglas ...*" *Id.*, at p. 1082-83 (cites omitted). In the Sixth Circuit, *Weberg v. Franks*, 229 F.3d 514 (6th Cir. 2000), also quite plainly states: "Because both Title VII and §1983 prohibit discriminatory employment practices by public employers, this court looks to Title VII disparate treatment cases for assistance in analyzing race discrimination in the public employment context under §1983." *Id.*, at p. 522 (footnote omitted). In

the Fifth Circuit, *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042 (5th Cir. 1996), stated: "To succeed on a claim of intentional discrimination under Title VII, Section 1983, or Section 1981, a plaintiff must first prove a *prima facie* case of discrimination." Id., at p. 1047. In the Third Circuit, "the standards governing a sex discrimination suit brought under §1983 are parallel to those employed under Title VII" and the *McDonnell/Douglas* burden-shifting analysis was applied. *Molthan v. Temple University*, 778 F.2d 955, 961 (3d Cir. 1985).

In the Eighth Circuit, *Hervey v. City of Little Rock*, 787 F.2d 1223, 1231 (8th Cir. 1986) states: "The common inquiry under §§1981, 1983 and Title VII is whether intentional discrimination was present." Similarly, in *Briggs v. Anderson*, 796 F.2d 1009, 1021 (8th Cir. 1986), the Court stated: "The inquiry into intentional discrimination is essentially the same for individual actions brought under §§1981 and 1983, and we will therefore confine the discussion to Title VII." The Eighth Circuit also stated "Discriminatory intent is the key issue under Title VII, §1981 and §1983." *Id.* at 1019.

It is not immediately apparent from its opinion why the Seventh Circuit declined to use Title VII analysis in Schroeder's case. However, in another opinion comparing a §1983 and Title VII sexual harassment claims, the Seventh Circuit has stated: "Under either cause of action, there must be a showing of sexual harassment or discrimination. There is, however, an important distinction for purposes of our review which exists between the two; intent to discriminate must be shown under equal protection while Title VII requires no such showing." *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990). The Seventh Circuit is wrong: intent to discriminate is always an element to be proved under Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *see also Briggs v. Anderson*, 796 F.2d at 1021.

While the United States Supreme Court has never directly addressed this issue, some Supreme Court precedents approve of using the same legal standards and

analysis among and across cases involving §1983, Title VII and Title IX (20 U.S.C. §1681 et. seq.). *See Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290-91, 118 S.Ct. 1989, 1999-2000, 141 L.Ed.2d. 277 (1998) (applying §1983 deliberate indifference standard (and citing §1983 caselaw) to the Title IX analysis); *see also Davis v. Monroe Board of Ed.*, 526 U.S. 629, 119 S.Ct. 1661, 1671, 143 L.Ed.2d 839 (1999) (discussing *Gebser*).

Petitioner Schroeder respectfully suggests that the Third, Fifth, Sixth, Eighth and Eleventh Circuit Courts of Appeals have the better reasoning and that the United States Supreme Court should resolve this conflict in favor of using Title VII analysis in §1983 cases where the claimed equal protection violation is illegal employment discrimination by a public employer.

Solid legal and public policy reasons require this. The Title VII analysis is a more well-developed and well-known method of analyzing the first and second prongs of the three-part Equal Protection analysis ((i) differential treatment, (ii) intent and (iii) no relationship to legitimate state interest). This is the proper analysis since the very gist of employment discrimination is differential treatment. A showing of intent is required under the Title VII analysis, just as it is under equal protection analysis. *Compare McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

As for the final prong –no relation to a legitimate state interest – plaintiff respectfully asserts there can be no legitimate state interest in discriminating in employment, not even to save money.

Applying Title VII analysis in §1983 employment discrimination cases would clarify and lend uniformity to the application of the law for the trial courts. This would also reinforce the principal that, when a private employer discriminates, it is illegal, but when a public employer discriminates it is both illegal *and* unconstitutional. *Johnson v. City of Ft. Lauderdale*, 148 F.3d 1228 (11th Cir. 1998) (§1983 and Title VII are and were meant to be parallel

remedies). Applying Title VII analysis would also allow a §1983 plaintiff to avail him or herself of the distinct analytical frameworks established under Title VII law: (i) hostile working environment cases (e.g., *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)) and (ii) differential treatment cases under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and its progeny. Since Schroeder has a hostile working environment case, it makes sense to use Title VII analysis, as cases that plead hostile working environments solely under §1983 are few and far between. *See Annis v. County of Westchester*, 36 F.3d 251 (2d Cir. 1994); *Quinn v. Nassau County Police Department*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999); *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994).

In the case at bar, plaintiff offered this analytical framework to the trial court and specifically invited the Seventh Circuit to follow its sister Circuits in applying the Title VII framework to this §1983 case.

The Seventh Circuit declined.

Plaintiff respectfully suggests that the better law and practice is that established in the Third, Fifth, Sixth, Eighth and Eleventh Circuits and apparently relied upon in the Second and Fourth Circuits; the Seventh Circuit should be reversed to make hostile working environment employment discrimination law under §1983 uniform.

THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH PELEVANT DECISIONS OF THIS COURT AND HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED, BY THIS COURT.

Aside from the question of which analytical framework should be used, the Majority Opinion below is in conflict with Supreme Court precedent and has decided an

important question of federal law erroneously. The Majority Opinion breaks new, and unconstitutional, ground in promulgating a rule that public entities may pick and choose who they will protect based on "limited resources" and whether money exists to pay for the protection. There is no support for this Supreme Court law and, frankly, the proposition is anathema to the concept of Equal Protection.

The Majority Opinion begins its decent into error by assuming, first, that "time and other resources" for governmental entities are limited. App. p.11a (*see also* Concurring Opinion, App. p. 18a). The Majority Opinion then goes on to make the assumption that, because of the limited time and resources, it is rational (and unavoidable) that governmental entities must prioritize protective activities. *Id.* As discussed *infra*, neither assumption is factually or logically correct and neither had evidentiary support in the trial court Record. The Majority Opinion then builds on these assumptions and instructs governmental entities that they may constitutionally rank groups in order of priority, and then provide more or less protection to individuals in those groups depending on where the group falls in the ranking. *Id.* Further compounding the error, the Majority Opinion holds that governmental entities in this Circuit may also constitutionally rank groups by size and give more protection to bigger groups. App. p. 11a ("If, as in the Hamilton School District, race relations are a particularly sensitive area, it is not irrational for school administrators to devote more time and effort to defusing racial tensions among *many* students than to preventing harassment of *one* homosexual teacher.") (emphasis added).

The Majority Opinion proffers these extraordinary pronouncements on the false belief that the rational basis test permits a governmental entity to use cost and limited resources as a legitimate reason for choosing which group or groups receive equal protection of the laws.

The legal principal put forth by the Majority Opinion is in conflict with *Romer v. Evans*, 517 U.S. 620, 634-35, 116 S.Ct. 1620, 134 L.E.2d 855 (1996). *Romer* struck down, as a violation of the Equal Protection Clause, a Colorado

constitutional provision that prohibited all legislative, executive, or judicial action designed to protect gays and lesbians from discrimination. *Romer specifically rejected* the argument that saving money was a legitimate state interest that permitted Colorado to withdraw equal protection from gays and lesbians. The Court stated: "Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective." *Id.* at p. 635.

The Majority Opinion cited two Supreme Court cases, both of which are completely inapposite. *Wayte v. United States*, 470 U.S. 598 (1985), allows prosecutorial discretion in the enforcement of laws requiring registration for the draft. *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107 (7th Cir. 1985), involves an administrative law question regarding whether a federal agency may use "common sense" in promulgating a rule against alleged deceptive practices by airlines, rather than be required to hold hearings. *Id.* at 1112-3. Neither case provides any support for the principal that limited resources permits the government to prioritize protective activities.

Not only does the Majority Opinion below conflict with Supreme Court precedent, it is bad public policy. To allow governmental entities to use "saving money" as the rational basis for choosing between and among which groups to protect will have catastrophic and far-reaching results, felt far beyond the confines of gay/lesbian civil rights. This is an exception that will swallow all the rules.

Plaintiff respectfully suggests that the reasoning used in *Saenz v. Roe*, 526 U.S. 489, 504, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999), be applied here. *Saenz* held saving money was a legitimate state interest, but it did not justify discrimination against the indigent. Plaintiff respectfully suggests that saving money cannot justify employment discrimination.

In the case at bar, not only did the Majority Opinion of the Seventh Circuit err by holding that, in general, saving

money can be a rational basis for choosing which groups are going to receive governmental protection, the Majority Opinion was also erred when it concluded that the defendants in this case used "limited resources" as their rationale for refusing to protect Schroeder from harassment.

The Majority Opinion basically fabricates from thin air this "rational" basis for the School District's discrimination of Schroeder. Philosophically, time and resources may be "limited," but it is false to assume that, in this case, time and resources *were* limited. Moreover, despite the Majority's assumption to the contrary, there is no necessary correlation between limited resources and a decision to prioritize protective activities. Confronted with both limited resources and a requirement of protection, a governmental entity has many choices. For example, the entity may: (i) increase resources, (ii) decrease levels of protection for all groups, (iii) choose to protect some groups and not others, (iv) choose to protect some groups more and some groups less. Options (iii) and (iv) are unconstitutional.

The Majority's conclusion that, in this case, the defendants used limited resources as its rational basis for denying Schroeder equal protection of the law is false. There is no evidence that Hamilton School District chose to allow Schroeder to be harassed and abused because they could not afford to protect him. There is no evidence that they chose to spend their resources elsewhere. There is simply no evidence at all to show how much time and how much money it would have taken to protect Schroeder from the harassment he suffered. That this is a disputed question of fact is abundantly demonstrated by the conflicting opinions written by the members of the Panel. *Cf.*, App. p. 11a, pp. 18a-19a (Posner, concurring), and pp. 25a-26a (Wood, dissenting). Just as importantly, the School District did not proffer this as a reason for refusing to protect Schroeder. Consequently, Schroeder was not given an opportunity at trial (or during discovery or summary judgment) to test with evidence the theory that the District did not have enough resources to protect "one homosexual teacher" from the taunting and abuse of students, teachers, staff and parents. The Majority based its decision on speculation, not the facts.

With due respect, the Majority Opinion issued by the Seventh Circuit is in error.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: August 15, 2002

(Any footnotes trail the end of each document.)
No. 01-1906

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Tommy R. Schroeder,
Plaintiff-Appellant,

v.

Hamilton School District, et al.,
Defendants-Appellees.

October 26, 2001, Argued

March 11, 2002, Decided

COUNSEL:
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For HAMILTON SCHOOL DISTRICT, GARY AMOROSO, DEAN SCHULTZ, RICHARD LADD, KATHLEEN COOKE, Defendants - Appellees: Michael J. Cieslewicz, KASDORF, LEWIS & SWIETLIK, Milwaukee, WI USA.

JUDGES:
Before Posner, Manion, and Diane P. Wood, Circuit Judges. Posner, Circuit Judge, concurring. Diane P. Wood, Circuit Judge, dissenting.

OPINIONBY:
Manion

OPINION:

Manion, Circuit Judge. Tommy Schroeder, a school teacher, filed suit against his former employer, the Hamilton [Wisconsin] School District, the school district administrator,

and several staff administrators (including school principals and human resource directors), pursuant to 42 U.S.C. § 1983, alleging that they violated his right to equal protection by failing to take reasonable measures to prevent students and parents, and occasionally fellow staff members, from harassing him about his homosexuality. The district court granted summary judgment for the defendants. Schroeder appeals, and we affirm.

I.

In 1990, after teaching for approximately 15 years in the Hamilton School District, Tommy Schroeder began teaching sixth grade at Templeton Middle School in Hamilton, Wisconsin. Shortly after arriving at Templeton, Schroeder disclosed his homosexuality to a few of his fellow staff members and, during his second or third year at the school, made the same disclosure at a public meeting. This information eventually spread throughout the Templeton community, and, beginning with the 1993-94 school year, Schroeder began receiving unpleasant inquiries and crude, occasionally cruel, taunts from students regarding his homosexuality. [n1]

While there were isolated incidents involving parents, [n2] as well as some of Schroeder's colleagues, [n3] the bulk of the harassment he endured at Templeton came from students. Some of the incidents were rather mild. For example, a fifth-grade girl asked Schroeder to verify a rumor that he was gay. Another student authored a note complaining that she had been disciplined by "the gay man." Finally, other students were found discussing Schroeder's homosexuality during homeroom.

Many of the reported student comments and actions, however, were far worse – accusations that he had AIDS; a student calling him a faggot and remarking "How sad there are any gays in the world"; another student physically confronted Schroeder after shouting obscenities at him; catcalls in the hallways that he was a "queer" or a "faggot"; obscenities shouted at him during bus duty; harassing phone calls with students chanting "faggot, faggot, faggot" and other calls where he was asked whether he was a "faggot"; and

bathroom graffiti identifying Schroeder as a "faggot," and describing, in the most explicit and vulgar terms, the type of sexual acts they presumed he engaged in with other men. He reported this harassment on several occasions, and the defendants "consequenced" (i.e., a term of art in education circles for student discipline) the students identified with the offensive behavior.[4] Much of the harassment, however, was anonymous, and therefore went unpunished. As Patty Polczynski, the associate principal at Templeton, told Schroeder, "it makes it difficult to consequence if you don't know who it is to consequence."

Because of the widespread, anonymous nature of the harassment, Schroeder demanded that the defendants conduct "sensitivity training" to condemn discrimination against homosexuals (presumably for the students at Templeton – the chief perpetrators of the harassment). Instead, Polczynski, after several meetings with Schroeder, circulated a memorandum to teachers and other staff noting that students were continuing to use "inappropriate and offensive racial and/or gender-related words or phrases," and that "if you observe or overhear students using inappropriate language or gestures, please consequence them as you feel appropriate . . . ." Schroeder considered this memorandum to be a milquetoast response to the harassment he was receiving, especially in comparison to a previous Polczynski memorandum warning staff that "derogatory racial comments and symbols" were "totally unacceptable" and "contrary to [the school's] efforts to create a positive academic environment for all students." When the harassment continued, Schroeder expressed his frustration to Polczynski, and she responded by telling him that "you can't stop middle school kids from saying things. Guess you'll just have to ignore it."

Finally, after several requests for a transfer, Schroeder was moved to Lannon Elementary School in the fall of 1996, where he taught first- and second-grade classes. After a year's respite, the taunts resumed. This time, however, they came primarily from adults, presumably the parents of students at Lannon. At the beginning of his second year at Lannon, an anonymous memo was circulated by a parent proclaiming,

"Mr. Schroeder openly admitted at a district meeting that he was homosexual. Is that a good role model for our 5-, 6- and 7-year-old children?" Schroeder also claims that he began hearing that certain staff members and parents were calling him a pedophile and accusing him of sexually abusing small boys. One parent removed his child from Schroeder's class because of Schroeder's homosexuality. Another parent's fear that Schroeder was a pedophile led defendant Richard Ladd, Lannon's principal, to raise the possibility of "proximity supervision" (i.e., meaning that Schroeder could not be alone with male students). The tires on Schroeder's car were slashed, and he began receiving anonymous, harassing phone calls at home (e.g. "Faggot, stay away from our kids" and "We just want you to know you . . . queer that when we pull out all our kids, you will have no job").

In February 1998, Schroeder, who has a protracted history of psychiatric problems, experienced a "mental breakdown." On February 11, 1998, Schroeder's last day at Lannon, Ladd approached him about complaints that he had received from some of his students' parents. Schroeder told Ladd that he did not want to talk about it, and that he was resigning. Later that day, Schroeder handed Ladd a letter of resignation. At this point, Ladd offered to arrange for a substitute teacher to take over Schroeder's class and requested that he take some time to think about whether he really wanted to resign. Schroeder declined the request, and never reported to work at Lannon again. Schroeder did, however, apply for medical leave and long-term disability insurance. Pursuant to terms of the collective bargaining agreement between the teacher's union and the Hamilton School District, the district terminated Schroeder's employment at the end of the 1998-99 school year.

Schroeder contends that the harassment he received from students, parents, and fellow teachers/staff members at Templeton and Lannon, coupled with the defendants' failure to properly address the problem, caused him to have a nervous breakdown that ultimately resulted in his termination. He therefore filed suit against the defendants, pursuant to 42 U.S.C. § 1983, alleging that they denied him equal protection of the law by failing to take effective steps to

prevent him from being harassed on account of his sexual orientation. The parties filed cross motions for summary judgment, and the district court granted summary judgment in favor of the defendants. Schroeder appeals the decision.

II.

We review de novo the district court's decision to grant summary judgment, construing all facts, and drawing all reasonable inferences from those facts, in favor of Schroeder, the non-moving party. Johnson v. Univ. of Wisconsin-Eau Claire, 70 F.3d 469, 477 (7th Cir. 1995). Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Schroeder argues that the defendants discriminated against him because of his sexual orientation, in violation of the Equal Protection Clause of the Fourteenth Amendment [n5] and 42 U.S.C. § 1983. [n6] According to Schroeder, the defendants treated him differently when addressing his complaints of harassment. He contends that the differential treatment was motivated by his homosexuality, and that the defendants were deliberately indifferent to the constant harassment he received from students and their parents.

In order to establish an equal protection violation, Schroeder must show that the defendants: (1) treated him differently from others who were similarly situated, (2) intentionally treated him differently because of his membership in the class to which he belonged (i.e., homosexuals), and (3) because homosexuals do not enjoy any heightened protection under the Constitution, see, e.g., Romer v. Evans, 517 U.S. 620, 634-35, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996); Bowers v. Hardwick, 478 U.S. 186, 196, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), that the discriminatory intent was not rationally related to a legitimate state interest. Hedrich v. Bd. of Regents of Univ. of Wisconsin Sys., 274 F.3d 1174, 1183 (7th Cir. 2001); Nabozny v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996). As we noted in Nabozny v. Podlesny, The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. A plaintiff must

demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decision-maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group. Id. 92 F.3d at 453-54 (citation omitted).

Therefore, "[a] showing that the defendants were negligent will not suffice." Nabozny, 92 F.3d at 454. For Schroeder's claim to withstand summary judgment, he must show that there is a genuine issue of material fact as to whether the defendants "acted either intentionally or with deliberate indifference" to his complaints of harassment because of his homosexuality. Id. The district court's decision to grant the defendants' motion for summary judgment of this claim must be sustained if the defendants demonstrate that they did not deny Schroeder equal protection on account of his sexual orientation, or that they had a "rational basis" for doing so. Id.

Schroeder attempts to side-step this analysis completely by inviting us to "hold explicitly that Title VII analysis/law shall apply in § 1983 cases where discrimination in employment is the basis for the claimed Equal Protection violation." Were this a Title VII case, the defendants could be liable to Schroeder if he demonstrated that they knew he was being harassed and failed to take reasonable measures to try to prevent it. See, e.g., Hall v. Bodine Elec. Co., 276 F.3d 345, 356 (7th Cir. 2002). Title VII does not, however, provide for a private right of action based on sexual orientation discrimination. See, e.g., Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000). As such, to the extent Schroeder seeks to have this court judicially amend Title VII to provide for such a cause of action, we decline to do so. It is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit. See Steel Co. v. Citizens for a Better Env't, 523

U.S. 83, 102, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) ("'the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.'") (citation omitted). Furthermore, even if Title VII provided a private right of action based on sexual orientation discrimination, § 1983 does not provide a remedy for rights created under Title VII. See, e.g., Trautvetter v. Quick, 916 F.2d 1140, 1149 n.4 (7th Cir. 1990); Gray v. Lacke, 885 F.2d 399, 414 (7th Cir. 1989). Finally, to the extent that Schroeder would like us to import Title VII employment discrimination standards into our traditional equal protection analysis, we decline the invitation.

We now turn our attention to Schroeder's secondary argument -- that even under a traditional equal protection analysis, the district court's decision must be reversed. Schroeder claims that he presented sufficient evidence to establish that the defendants treated his complaints of harassment differently because of his homosexuality. His primary contention is that the defendants failed to address his complaints in the same manner that they handled complaints of harassment based on race or gender. However, as the district court correctly noted, "in this case there is scant evidence that the incidents involving Schroeder were treated differently from those involving other teachers." Instead, Schroeder would have us infer differential treatment because: (1) a memorandum circulated by the associate principal at Templeton, Patty Polczynski, failed to address and condemn the widespread use by students of "hetero-sexist" and "anti-gay" comments in the same manner that a previous memorandum had done with respect to racist comments and symbols, and (2) while the Hamilton School District held several district-wide staff/teacher training sessions and conducted annual student orientation programs to implement its policies prohibiting race and sex discrimination, the district never held similar training sessions or student programs to address sexual orientation discrimination.

These events do not, however, demonstrate that Schroeder was treated differently from his non-homosexual

colleagues, or that he was discriminated against on the basis of his homosexuality. First, as Schroeder acknowledges, the initial memorandum circulated by Polczynski was generated in response to the pervasive use of racist comments and symbols by students in the Hamilton School District. Polczynski explained her motivation for circulating the memorandum in the memorandum itself, noting that the derogatory racial comments being made by students were "contrary to [the school's] efforts to create a positive academic environment for all students." Additionally, the district-wide staff/teacher training sessions on race discrimination, referred to in Schroeder's appellate briefs, were conducted in the early 1990's when the Hamilton School District began busing black students into its schools from the Milwaukee County Schools. The training sessions and student orientation programs were conducted to ensure that incoming minority students were not subjected to racial discrimination, and to increase sensitivity to racial issues among school district personnel and students. By citing these examples, Schroeder attempts to set up a false dichotomy – i.e., disparity of treatment/protection given to blacks/women as compared with homosexuals. In reality, these examples merely demonstrate the school district's priorities for use of time and resources in favor of its students. And this is certainly understandable given the limited resources of today's public schools. Furthermore, in a school setting, the well-being of students, not teachers, must be the primary concern of school administrators. Not only are schools primarily for the benefit of students, but it is also clear that children between the ages 6 to 14 are much more vulnerable to intimidation and mockery than teachers with advanced degrees and 20 years of experience. Likewise, with this vulnerability in mind, school administrators must be particularly steadfast in addressing and preventing any form of verbal or physical harassment/abuse directed at their students. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (where Supreme Court held that schools receiving federal funding can be held liable under Title IX for deliberate indifference to known acts of student-on-student sexual harassment). See

also Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 466-67 (7th Cir. 2001) (court upheld a school principal's decision prohibiting a Bible Club from including a cross as part of a mural display, where the principal's decision was based on a legitimate fear that the approval "of so salient a Christian symbol . . . might . . . require him to approve murals of a Satanic or neo-Nazi character, which would cause an uproar."). They must also be cautious about using police tactics to deal with nonviolent harassment of a teacher by students, even if that harassment is offensive and cruel.

Schroeder also points to the manner in which the defendants responded to his complaints about the harassment he received during "bus duty" as yet another example of differential treatment and deliberate indifference. He contends that this harassment was especially intense. It is uncontested that Schroeder requested to be removed from bus duty, and that his request was denied by school administrators. There is nothing in the record, however, indicating that, in denying his request, the school administrators treated Schroeder differently from similarly situated non-homosexual teachers. Schroeder contends, however, that Polczynski admitted during her deposition that if a female teacher had been subjected to the same type of harassment, she would have responded differently. The deposition testimony Schroeder relies upon in support of this assertion, however, does not support his claim. As the district court properly noted, Polczynski testified that, when the students could be identified they were removed from the bus and questioned. She also testified that, when the students could not be immediately identified, she did not remove every student from the bus (which typically would have been about 60 students) and question them individually. Polczynski did not, however, testify that she would have questioned each student on the bus in the hypothetical case involving the female teacher.

In any event, even were we to presume differential treatment, the fact that the defendants failed to remove Schroeder from bus duty does not establish that they were deliberately indifferent to his complaints.

Schroeder cites an incident involving vulgar student-authored bathroom graffiti as additional evidence of differential treatment. While admitting that school administrators identified and punished the offending students, he claims that the school's response to the situation deviated from its normal policies and procedures. The district court determined, however, that Schroeder's assertion of differential treatment in this case was supported only by "essentially self-serving assertions" and inadmissible hearsay. The district court, therefore, ruled that Schroeder "failed to make a showing sufficient to enable a reasonable trier of fact to find that he was treated differently." [n7] Having reviewed the record, we concur with the district court's conclusion in this regard. Furthermore, the fact that the defendants promptly addressed the situation (i.e., removed the graffiti), and punished the offending students, forecloses the possibility of any inference that they were deliberately indifferent to the harassment.

Finally, Schroeder contends that the defendants discriminated against him because the Hamilton School District had policies against race and sex discrimination, but did not have one against sexual orientation discrimination. While this is most certainly true, the lack of such a policy is not evidence that the defendants were deliberately indifferent to his complaints of harassment. As previously noted, unlike blacks and women, homosexuals are not entitled to any heightened protection under the Constitution. Therefore, discrimination against homosexuals, or for that matter the elderly, overweight, undersized, or disfigured, will only constitute a violation of equal protection if it lacks a rational basis. See, e.g., Romer, 517 U.S. at 634-35 (where Supreme Court held that a state constitutional provision violated the Equal Protection Clause because it was motivated by a baseless hostility to homosexuals). Here, there is no evidence that the defendants' decision not to implement a separate policy against sexual orientation discrimination was based on any animus toward Schroeder or homosexuals in general. Schroeder appears to suggest, however, that the only way the defendants could have prevented the harassment was by requiring all Hamilton School District personnel and students

to attend mandatory training sessions on sexual orientation discrimination. There are several problems with this argument.

First of all, it is hardly reasonable to expect a school district to devote a substantial amount of resources to curb the harassment of one teacher, regardless of the basis for the harassment. In this case, other than Schroeder's situation, there is no evidence of any discrimination against homosexual teachers or students in the Hamilton School District. Instead, the evidence shows that one teacher, who happened to be a homosexual, was harassed because of his homosexuality. As emphasized in Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 300-01 (6th Cir. 1997), another decision involving a claim of denial of equal protection on grounds of sexual orientation discrimination, it is not irrational to prioritize protective activities. It is in fact unavoidable, because of limitations of time and other resources. Cf. Wayte v. United States, 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985); United Air Lines, Inc. v. Civil Aeronautics Bd., 766 F.2d 1107, 1113 (7th Cir. 1985). If, as in the Hamilton School District, race relations are a particularly sensitive area, it is not irrational for school administrators to devote more time and effort to defusing racial tensions among many students than to preventing harassment of one homosexual teacher. However, even if the defendants had been inclined to devote more resources to prevent Schroeder from being harassed, it is hard to see how teaching the district's teachers and staff about sexual orientation discrimination would have prevented the primary perpetrators, the students and their parents, from harassing him. In any event, the staff and faculty were aware of the problem. But disciplining the students identified as perpetrators was, in Schroeder's view, not a sufficient response.

Schroeder's exhortation to adopt a specific policy requiring students to be sensitive to, or accepting of, homosexuals is especially problematic in an elementary or early middle school (i.e., sixth grade) setting. What would such a policy say? It is relatively simple to explain to a child that he or she should not criticize or offend someone because

of the color of their skin, or because they are a boy or a girl. This is why blacks and women are described as "discrete and insular" groups. See, e.g., Hicks v. Resolution Trust Corp., 970 F.2d 378, 382 (7th Cir. 1992). Unfortunately, there is no simple way of explaining to young students why it is wrong to mock homosexuals without discussing the underlying lifestyle or sexual behavior associated with such a designation.

Schools can, however, teach their students that it is wrong to mock anyone, for any reason. School administrators can, and should, insist that students behave in a courteous and respectful manner toward their teachers and other students. Such a policy would not require any discussion of homosexuality, or any other characteristic or behavior associated with it. If a student calls a teacher or another student a "faggot," he should be disciplined for violating the school's general civility code. If a student assaults a faculty member or another student because he is a homosexual, or because he is overweight, disfigured, undersized, or aged, he should be suspended or expelled for the assault. Students who are inconsiderate, disrespectful, mean, or even vicious, to others should be "consequenced" for what they do, not for the underlying motivation. Students must be taught – at school if not at home – that it is reprehensible to cruelly mock and malign staff members and other students – for any reason. In this case, the record is clear: When school administrators determined that a student harassed Schroeder by using derogatory terms like "faggot," the student was punished. By punishing these students, the defendants made it abundantly clear to the student population that such terms were totally unacceptable in polite society. This is all that was required of them.

That being said about disrespectful students, a short word about difficult parents. Schroeder asserts that he was also harassed by parents, and that the defendants did nothing about it because of his homosexuality. In support of his claim, Schroeder points to a memorandum, apparently circulated by a parent, which questions his qualifications to teach and criticizes the school's decision to blend first- and second-grade classes. The first paragraph alerted parents to the fact that Schroeder was an admitted homosexual, and

presented the rhetorical question, "Is this a good role model for five-, six- and seven-year-old children?" Schroeder, like any well-qualified teacher, should be a good role model for his students, not because he is homosexual, but because he is an effective and enthusiastic teacher who wants them to learn. Regardless of the parental attitude displayed in the memorandum, however, school administrators have little or no power to "consequence" the parents of students. Obviously, if a child picks up foul language and prejudicial views from his parents at home, and then displays them at school, he should be disciplined. A student cannot, however, be disciplined for expressing a home-taught religious belief that homosexual acts are immoral. See, e.g., Tinker v. De Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (holding that students "may express [their] opinions, even on controversial subjects . . . if [they do so] without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.") (citation omitted); Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1536 (7th Cir. 1996) (holding that "religious speech cannot be suppressed solely because it is religious (as opposed to religious and disruptive or hurtful, etc.) . . . in the elementary school environment."). Administrators have to tiptoe on a narrow path when dealing with a child's unwarranted prejudices as opposed to his sincerely held religious beliefs. Beyond that, the Equal Protection Clause does not require a school district to do anything about parental unpleasantries unless they take place on school grounds. Schroeder could have reported the anonymous harassing phone calls he received, presumably from parents, to the telephone company, and any threats of physical violence to the police. School administrators have little authority to control parental activity.

To prevail, Schroeder needed to demonstrate that the defendants were deliberately indifferent to his complaints. He has conceded, however, that the defendants took some action in response to nearly all of his complaints. Nevertheless, as the district court noted, "at times, the plaintiff appears to be taking the position that the defendants are liable merely

because the disciplinary and investigative measures they took were less than 100 percent effective." The defendants' failure to address, to Schroeder's satisfaction, his complaints of harassment does not, however, establish an equal protection violation. Given that the majority of the harassment at issue in this case was anonymous, we are skeptical about whether the defendants could have done much more to prevent the harassment without expending a disproportionate commitment of resources, or fashioning a draconian response that would unnecessarily infringe on the rights of the non-offending students.

The question in this case is not whether the defendants did enough to engender a more positive attitude among its students and staff toward homosexuality. Rather, the only issue is whether the manner in which the defendants handled Schroeder's complaints of harassment denied him equal protection under the law. School administrators disciplined the identified students who misbehaved and degraded him, and made an effort to discover those not identified. There is no evidence that the defendants were deliberately indifferent to his situation, or that they did not make a sincere effort to deal with his complaints. [n8] On the contrary, the record shows that the school district was genuinely concerned about the treatment Schroeder experienced, and that it did what reasonably could be expected under the circumstances. The record is replete with memos, correspondence, and testimony indicating that various administrators and staff positively responded to his requests. In the absence of deliberate indifference, federal judges should not use rational basis review as a mechanism to impose their own social values on public school administrators who already have innumerable challenges to face.

Schroeder's breakdown and his current psychological condition are unfortunate. To the extent that student and parental harassment of him exacerbated his long history of personal and psychological problems, that is also unfortunate. There is, however, no evidence that the defendants denied him the equal protection of the law.

III.

Schroeder failed to demonstrate that the defendants treated his complaints of harassment differently from those lodged by non-homosexual teachers, that they intentionally discriminated against him, or acted with deliberate indifference to his complaints because of his homosexuality. The district court, therefore, properly granted the defendants' motion for summary judgment. AFFIRMED.

Footnotes

n1 On appeal, Schroeder cites only one incident of harassment as having occurred prior to the 1993-94 school year. He claims that in 1989 an eighth-grade student called him a "stupid faggot," and told him that he was "going to blow [his] . . . head off."

n2 For example, in 1995, the father of one student told Schroeder, "I don't want queers teaching my son."

n3 Schroeder contends that one teacher was overheard saying that Schroeder was gay and that his former lover had died of AIDS. Another teacher allegedly called a friend of Schroeder's "a flaming homo-sexual." Schroeder claims that his "sexual orientation was the topic of gossip and innuendo among teachers [at Templeton]," and that he was told by others that some teachers were making derogatory remarks about him. One of the principals at Templeton made derogatory remarks about gays and lesbians (although his remarks were apparently not directed at Schroeder or done in his presence). Schroeder has conceded, however, that none of the individual defendants ever made derogatory comments about him personally or his sexual orientation. He also testified at his deposition that no teacher or staff member at Templeton ever harassed him on a daily basis. Finally, Schroeder has admitted that he refused to disclose the names of staff members who he claims harassed him on occasion.

n4 For example, the students who "graffiti-bombed" the bathroom were punished for vandalism.

n5 The Equal Protection Clause provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

n6 42 U.S.C. § 1983 provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

n7 Schroeder's attorney even acknowledged that "uncovering evidence of differential treatment based on comparison was difficult."

n8 Our conclusion that the defendants did not act with deliberate indifference to Schroeder's complaints obviates the necessity of addressing his argument that the defendants are also subject to § 1983 liability under Monell v. New York City Dept. of Soc. Services, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), and its progeny.

CONCURBY:
Posner

CONCUR:

Posner, Circuit Judge, concurring. I join Judge Manion's opinion without reservations but write separately to emphasize that our decision would have to be the same even if Schroeder were right that the school administrators' response to his complaints about the harassment to which he was subjected was tepid in comparison to their response to signs of racial prejudice, so that they were in a sense, though a severely attenuated one, "discriminating" in favor of blacks by giving blacks more protection than they were giving this homosexual teacher.

From a historical standpoint the core violation of the equal protection clause is indeed the selective withdrawal of

police protection from a disfavored group, as the term "equal protection of the laws" connotes. E.g., DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298, 301 (7th Cir. 1987), affirmed, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989); Bohen v. City of East Chicago, 799 F.2d 1180, 1190 (7th Cir. 1986) (concurring opinion); David P. Currie, "The Constitution in the Supreme Court: Limitations on State Power, 1865-1873," 51 U. Chi. L. Rev. 329, 353-54 & n. 144 (1984). It is this principle that Schroeder tries to fit himself within. If police decide not to protect blacks from criminals, but to protect whites, that is a denial of equal protection. Palmer v. Thompson, 403 U.S. 217, 220, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1971); Hilton v. City of Wheeling, 209 F.3d 1005, 1007 (7th Cir. 2000). And likewise a public school that decides not to protect black students from being harassed by other students, but to protect white students from such harassment, denies equal protection. Gant ex rel. Gant v. Wallingford Board of Education, 195 F.3d 134, 139-40 (2d Cir. 1999). But Schroeder is not black. Blacks are one of the groups that the Supreme Court has decided deserve special protection against discrimination by public entities. (Women too – cases like Gant but concerning failure to protect women equally with men from sexual harassment are illustrated by Reese v. Jefferson School District No. 14J, 208 F.3d 736, 740 (9th Cir. 2000). But Schroeder is no more a woman than he is a black. He is a white male.) Deliberate discrimination on racial grounds by a public body is unlawful unless a compelling case of public need is shown, unless, that is, in the lingo of the cases, the discrimination can survive "strict scrutiny."

Homosexuals have not been accorded the constitutional status of blacks or women. This does not make them constitutional outlaws. Any group, or for that matter any individual (as the "class of one" equal protection cases establish, e.g., Village of Willowbrook v. Olech, 528 U.S. 562, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000) (per curiam); Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001); Hilton v. City of Wheeling, supra, 209 F.3d at 1007; Shipp v. McMahon, 234 F.3d 907, 916 (5th Cir. 2000)), has a right not to be victimized by an irrational withdrawal of state protection.

But the word "irrational" is the key to determining the scope of this principle. Discrimination against homosexuals by public entities violates the equal protection clause only if it lacks a rational basis, as it would do if it were motivated by baseless hostility to homosexuals, the motivation that the Supreme Court in Romer v. Evans, 517 U.S. 620, 634-35, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), attributed to a state constitutional provision that forbade municipalities to enact gay-rights ordinances; see also Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997), or if, though devoid of animus, the discrimination simply bore no rational relation to any permissible state policy.

Schroeder has not presented evidence from which a reasonable jury could infer that the defendants, which is to say the school and the school authorities as distinct from students and parents, were hostile to Schroeder because he was a homosexual (were hostile to him, period), although the character of the defendants' response to his complaint may have been influenced by the hostility of some parents to the idea of their kids' being taught by a homosexual. As for whether the defendants would have been irrational in failing to protect a homosexual teacher as assiduously as they would have protected a black or female teacher subjected to the same amount of abuse, a number of considerations show that they would not have been. The first is that, as pointed out in another decision involving a claim of denial of equal protection on grounds of sexual orientation, Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 300 (6th Cir. 1997), it is not irrational to prioritize protective activities. It is in fact unavoidable, because of limitations of time and (other) resources. Cf. Wayte v. United States, 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985); United Air Lines, Inc. v. Civil Aeronautics Bd., 766 F.2d 1107, 1113 (7th Cir. 1985). If race relations are a particularly sensitive area in a particular school, the school authorities are not irrational in deciding to devote more time and effort to defusing racial tensions than to preventing harassment of a homosexual (or overweight, or undersized, or nerdish, or homely) teacher.

It is true that the out-of-pocket costs of some additional measures that the defendants might have taken, for example adding to every memo warning against discrimination on grounds of race the words "or sexual orientation," would have been slight. But such an addition would have had a negligible effect without amplification – except perhaps to dilute the warning against racial discrimination. The more amplification, moreover, the greater the dilution – which shows that the measure would not have been costless after all.

Second, when most of the abuse directed at a person is anonymous, the school authorities may be unable to prevent it without a disproportionate commitment of resources to the effort or a disproportionate curtailment of student rights. Indeed, as Judge Manion's opinion properly emphasizes, a public school's primary commitment is to its students, not to its teachers, and this limits the extent to which it must use police tactics to deal with nonviolent, though offensive and wounding, harassment of a teacher by students.

Third, as also properly emphasized by Judge Manion, when harassment of a teacher or a student is based upon his sexual orientation or activity, the school authorities' options are limited by an understandable reticence about flagging issues of sex for children. It is true that many experts on education think it best to inform children about sex as early and as thoroughly as possible, in order to minimize disease and pregnancy risk; that certainly has been the trend in the wake of the AIDS epidemic. Douglas Kirby et al., "School-Based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness," 109 Public Health Report 339 (1994). But it is possible for a rational school administration to fear that if it explains sexual phenomena, including homosexuality, to schoolchildren in an effort to get them to understand that it is wrong to abuse homosexuals, it will make children prematurely preoccupied with issues of sexuality.

Fourth, it is a mistake automatically to equate favoritism to discrimination. The difference is that while discrimination against a group harms the group, favoritism for another group may not harm the nonfavored group, or may harm it too

slightly for the law to take notice. Even if the school authorities had no good reason to be as solicitous of the welfare of their black and female students as they were, it would not follow that, had they been less solicitous of them, Schroeder would have benefited; and, if not, then how was he hurt?

The considerations that I have listed did not figure in Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996), on which Schroeder principally relies. A homosexual student was assaulted by other students – physically, not merely verbally -- and the school administration did nothing at all. We said: "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one." Id. 92 F.3d at 458. The rational-basis test is not demanding, but the school there managed to flunk it – and besides there was evidence that the school officials actually "laughed and told Nabozny that Nabozny deserved such treatment because he is gay." 92 F.3d at 452. Such evidence alone could prove animus and thus obviate any need to prove the absence of a rational basis for the discrimination, and it figured importantly in the court's holding. See id. 92 F.3d at 455. Moreover, it was a case of violence against a student, not verbal abuse of a teacher.

The administration of the public schools of this country in the current climate of rancid identity politics, pervasive challenges to authority, and mounting litigiousness is an undertaking at once daunting and thankless. We judges should not make it even more daunting by injecting our own social and educational values in the name of "rationality review." So while in hindsight it appears that the defendants could have done more to protect Schroeder from abuse, it is equally important to emphasize that lackluster is not a synonym for invidious or irrational. There is no evidence that the defendants were hostile to Schroeder because of his sexual orientation – or because of anything else, for that matter. And they cannot be said to have been irrational in failing to do more than they did, as there were rational considerations counseling against more vigorous action.

DISSENTBY:
Diane P. Wood

DISSENT:

Diane P. Wood, Circuit Judge, dissenting. In this case, the majority holds that Tommy Schroeder, an openly homosexual teacher who was subjected to severe harassment on the job, cannot survive summary judgment on his claim under 42 U.S.C. § 1983 that defendant Hamilton School District and some of its administrators violated his rights under the Equal Protection Clause of the United States Constitution. In my view, this holding and the rationale both the majority and concurrence have used to reach it are inconsistent with the Supreme Court's recognition in Romer v. Evans, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), that the Equal Protection Clause does protect homosexuals as a class and that this protection may not be denied simply because they may be an unpopular class in a given state or local community. I therefore respectfully dissent.

Because the majority has already furnished many of the relevant facts, I will simply highlight those that appear especially important to me. First, there is no dispute that Schroeder was a very good teacher; he taught successfully for the District for 22 years. Whatever psychiatric problems he may have had, see ante at 5, 17 (majority opinion), it is clear that he had them under control until the unrelenting harassment to which he was subjected on the job caused him to have a full mental breakdown on February 11, 1998. He left the school that day a ruined man; when it became apparent that he could not return, the District terminated him. His vulnerability in no way excuses the District for the well-known reason that tort-feasors take their victims as they find them. See Restatement (Second) of Torts § 461 (1986 App.); see also Brackett v. Peters, 11 F.3d 78, 81 (7th Cir. 1993) ("It has long been the rule in tort law (the 'thin-skull' or 'eggshell-skull' rule) not only that the tort-feasor takes his victim as he finds him, but also that psychological vulnerability is on the same footing with physical.").

In addition, Schroeder complained repeatedly to the school officials about the vicious harassment the students and occasionally others directed toward him. Compare Frazier v. Delco Electronics Corp., 263 F.3d 663, 666 (7th Cir. 2001); Haugerud v. Amery School Dist., 259 F.3d 678, 700 (7th Cir. 2001); Adusumilli v. City of Chicago, 164 F.3d 353, 361 (7th Cir. 1998) (all recognizing that an employer is only liable under Title VII for co-worker harassment if it is negligent, and that this normally means the employee must bring the harassment to the employer's attention). See also Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (holding that private damages are available in a suit based on Title IX of the Education Act only where the funding recipient acts with deliberate indifference and the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the educational benefit or program). His efforts to alert the District to the problem and to seek redress eliminate any possibility of the District's defeating this claim of intentional discrimination through a claim of lack of knowledge.

Despite the majority's efforts to find remedial efforts in the District's generalized responses, it is plain that the District never in any way took action specifically designed to inform the students that certain words or phrases that reflect negative views about homosexuals were out-of-bounds, nor in any other way did it tell them that harassment or discrimination based upon Schroeder's sexual orientation was impermissible. It would have been easy enough, as part of the philosophy of "courtesy to all" that the majority advocates, to prohibit certain words or actions without a detailed discussion of the sexual behavior of adults.

Finally, the District treated the class of homosexuals differently from the way it treated other classes, such as racial minorities or gender, as illustrated by the memorandum it circulated cautioning the community to avoid "offensive racial and/or gender related words or phrases." Even the majority concedes this, ante at 12, when it admits that the District had no policy against discrimination based on sexual orientation and did have such policies against other forms of discrimination. Since even this court believes that

discrimination based on sexual orientation is not "gender-related," see, e.g., Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000), there is every reason to think that the students of the Hamilton School District might have thought the same thing and concluded that the District's policy did not require them to avoid what is often referred to as gay-bashing.

The majority acknowledges that the core violation of the Equal Protection Clause is "precisely the selective withdrawal of police protection from a disfavored group . . . ." Ante at 18 (concurrence). See also Village of Willowbrook v. Olech, 528 U.S. 562, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000) (per curiam) (recognizing that even a "class of one" may state a claim under the Equal Protection Clause). It also appears to admit that homosexuals might constitute one such group. Ante at 7 (majority opinion); ante at 19 (concurrence). Indeed so, as the Supreme Court's Romer decision makes clear. And, it is worth noting that Romer is the only decision from the Supreme Court in recent years to address an equal protectionargument where the class of homosexuals were singled out for uniquely disfavored treatment. Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), looked only at the question whether the enforcement of the Georgia sodomy statute violated the fundamental rights (meaning substantive due process rights) of homosexuals in that state. The Court was careful to note that it was not addressing any equal protection argument. See id. 478 U.S. at 202-03 n.2. In Webster v. Doe, 486 U.S. 592, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988), the Court considered the question whether an avowedly homosexual man could bring a lawsuit against the Director of Central Intelligence, who had fired him expressly because he was homosexual. The Court concluded that the plaintiff had no claim under § 102(c) of the National Security Act, 50 U.S.C. § 403(c), because the Director's termination decisions were committed to agency discretion (as that term is used in the Administrative Procedures Act, 5 U.S.C. § 701), but it remanded for further proceedings on the plaintiff's constitutional claims, including his claim based on the Equal Protection Clause. The later case of Boy Scouts of America v. Dale, 530 U.S. 640 (2000),

dealt with the question whether the First Amendment associational rights of the Boy Scouts organization would be infringed if it was compelled to accept a scout leader it did not want. In that case, the reason the Boy Scouts did not want respondent Dale in its organization was Dale's sexual orientation. But the Equal Protection Clause naturally enough did not figure in the Court's opinion because the Boy Scouts is a private organization and thus not a "state actor" for purposes of the Fourteenth Amendment. That leaves us with Romer as the governing Supreme Court decision on the applicability of the Equal Protection Clause to the class of homosexuals.

Nothing in Romer justifies a system under which a state or state actors like the District and its officials deliberately either omit altogether or give a diminished form of legal protection from verbal or physical assaults to individuals in certain disfavored classes. Yet both the majority opinion and the concurrence see no problem in the fact that the defendants intentionally responded less vigorously to the abuse that finally broke Schroeder than they themselves would have done for others. In fact, the majority seriously understates the case. Never, in the course of these events, did the administration ever attempt to dissuade either students, parents, or anyone else in the broader community of the school district, to refrain from discrimination or harassment based upon sexual orientation. Indeed, as I have already noted, school officials never even told the students that the words being used to describe Schroeder transgressed the general code of civility the majority is recommending to schools. Schroeder was just told to tough it out. The majority also makes the unwarranted factual finding that there was no evidence of hostility to Schroeder. Even a glance at the facts the majority itself has set out shows that this is, at a minimum, a disputed point of fact.

Last, the majority seems to believe that a lack of resources might have prevented the District from responding to Schroeder's complaints. See ante at 13 (majority opinion); ante at 20 (concurrence). This cannot be a serious point. Adding two words, "sexual orientation," to the memorandum that was circulated could hardly have added a second to the

secretarial time involved, nor could it have added appreciably to the amount of toner consumed by the photocopying machine. This case is nothing like Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), on which both of my colleagues rely heavily. Equality Foundation was a case in which the court upheld the city's refusal to include homosexuals in a specially protected class, whereas here the only thing Schroeder wants is the same treatment that everyone else is receiving – that is, the kind of treatment to which the Constitution entitles him, according to Romer v. Evans. The glaring absence of the words "sexual orientation" in the memorandum, coming on the heels of the offensive incidents and Schroeder's complaint about exactly that kind of harassment, implies official tolerance, if not endorsement, of the behavior in which the students and others had been engaging. As I believe the majority acknowledges, the mere fact that members of some religious groups think that homosexuality is immoral also in no way excuses a public school's tolerance of harassing conduct based on sexual preference. Some religions profess beliefs that are incompatible with the individual guarantees found in the Bill of Rights, as we have seen to our sorrow in the recent history of the Taliban group in Afghanistan, whose views about the role of women in society could never be adopted by a public body here. In this country, nondiscriminatory secular norms of conduct ordinarily prevail even if they conflict with particular religious beliefs or practices. See, e.g., Employment Division v. Smith, 494 U.S. 872, 878-79, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990); Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944); Reynolds v. United States, 98 U.S. (8 Otto) 145, 25 L. Ed. 244 (1879).

I do not disagree that each case of harassment or discrimination must be evaluated on its own facts. Nor do I quarrel with the proposition that proper allocation of investigative resources may require devoting less time and effort to some complaints than to others. That decision, however, must be made on a case-by-case basis. Systematically to put cases involving harassment based on homosexuality (or any other recognized classification) below

the threshold for any action at all amounts to the kind of differential unfavorable treatment that the Equal Protection Clause reaches. I had thought that Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996), which the majority hardly discusses and the concurrence attempts to distinguish, settled the point that sexual orientation discrimination could not be treated in such a cavalier fashion.

Schroeder has shown that he suffered harassment so severe that he experienced a total mental breakdown; he has shown that a reasonable trier of fact could find that the school district officials acted intentionally when they failed to respond to his complaints; and he has shown that the trier of fact could also infer that his unfavorable treatment occurred because of his homosexuality. This is more than enough, in my view, to allow him to proceed to trial in his case against the District. I would Reverse the district court's judgment and Remand for that trial.

Case No. 98-C-1270

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TOMMY R. SCHROEDER,
Plaintiff,

v.

HAMILTON SCHOOL DISTRICT, GARY AMOROSO, DEAN SCHULTZ, RICHARD LADD, KATHLEEN COOKE, KRIS WETHERALL, KEITH HICKLIN, KATHERINE CROWLEY, AND PATTY POLCZYNSKI,
Defendants.

Filed March 16, 2001

DECISION AND ORDER

This action was commenced when, on December 31, 1998, Tommy r. Schroeder filed a complaint in the United States District Court for the Eastern District of Wisconsin. The complaint names as defendants Hamilton School District, Gary Amoroso (employed by the District as, at different times during the relevant period, Principal of Templeton Middle School, Principal of Hamilton High School, and Director of Educational Services/ Human Resources), Dean Schultz (employed by the District as Director of Educational Services/ Human Resources beginning July 1, 1996), Richard Ladd (employed by the District as Principal of Lannon Elementary School beginning July 1, 1997), Kathleen Cooke (employed by the district as the District Administrator beginning July 1, 1993), Kris Wetherall (employed by the District as a teacher at Lannon Elementary School beginning in 1995), Keith Hicklin (employed by the District as the Principal of Templeton Middle School from September 7, 1993, to June 30, 1996), Katherine Crowley (employed by the District as Assistant Principau Activities Coordinator at Templeton Middle School from July 1, 1990, to June 30, 1992,

and as Associate Principal at Templeton Middle School from July 1, 1992, to July 1, 1994), and Patty Polczynski (employed by the District as Associate Principal at Templeton Middle School from August 23, 1994, to June 30, 1996, and as Principal beginning July 1, 1996).

The complaint alleges that the defendants are liable under 42 U.S.C. § 1983 for violating the plaintiffs Fourteenth Amendment right to equal protection of the laws. On September 25, 2000, pursuant to a stipulation between the parties, the court entered an order dismissing Katherine Crowley and Kris Wetherall from this action with prejudice and without costs.

The following motions are currently before the court: (1) defendants' motion for summary judgment; (2) plaintiff's motion for summary judgment; (3) defendants' motion in limine to bar testimony by Ellen Bravo; and (4) defendants' motion in limine to limit testimony of Dr. Paul Linden. The court will deal first with the defendants' motion for summary judgment

I. FACTS

Each party has submitted its own proposed findings of fact. Each has also submitted objections to its opponent's proposed findings. After reviewing these documents, the court finds the following uncontested facts.

Tommy Schroeder taught in the Hamilton School District from 1976 until February 11, 1998. He taught at Templeton Middle School (Templeton) from approximately 1990 through the end of the 1995-96 school year.

Between 1993 and 1998, Schroeder was often harassed because he was gay. For example, on two occasions, one in 1994 and one in 1995, students vandalized a school bathroom, writing on the walls vulgar comments about Schroeder such as "Schroeder sucks big cocks." Although Templeton's

associate principal (a position held by either Katherine Crowley or Patty Polczynski during the 1994-1995 school year)fn1 has the primary responsibility for disciplining students, the school's principal (Keith Hicklin) handled the disciplinary actions for the students responsible for this particular incident.

Following the graffiti incident, there was much "talk and gossip", among both teachers and students about the incident itself and about Schroeder's sexual orientation. Defendant Gary Amoroso, who was Templeton's principal from July 1, 1990, to July 22, 1993, Hamilton High School's principal from July 23, 1993, to August 14, 1994, and Director of Educational Services/ Human Resources from August 15, 1994, to June 24, 1996, made derogatory comments about gays and lesbians. Schroeder heard that teachers at Templeton were making derogatory comments about him as well. In January of 1995, Schroeder reported that he had overheard a student say "it's too bad there are any gays at all." About two weeks later a student's father told Schroeder, "I don't want queers teaching my son." Schroeder also was told by at least two teachers from another school in the district that elementary school students were gossiping about his sexual orientation.

Schroeder also received "abusive and obscene phone calls" at his home, during which the callers would do such things as chant "faggot, faggot, faggot." Schroeder also had an obscene phone call left on his school voicemail. He reported the incident and defendant Hicklin, the Templeton principal, listened to the recording.

Schroeder also received a harassing note in his school mailbox asking him if he was a "faggot." One student passed to another a note about Schroeder's sexual orientation, and another student passed a poem describing Schroeder in derogatory terms. Schroeder also had obscenities (such as "queer", "faggot", and "cocksucker') shouted at him while he was on bus duty; he was once physically confronted by one of the students who had been shouting obscenities.

Schroeder had four or five conversations one as early as January 1995, with defendant Polczynski during which he reported being harrassed by students. During one of these conversations, Polczynski responded to Schroeder's complaints by saying "you can't stop middle school kids from saying things. Guess you just have to ignore it."

Schroeder also reported the incidents that occurred while he was on bus duty and asked both defendant Polczynski and defendant Hicklin to remove him from bus duty; each denied his request.

At the end of the 1993-94 school year and again on April 15, 1996, Schroeder requested a transfer to one of two elementary schools in the district. The latter request was granted and Schroeder was transferred to Lannon Elementary School. He taught at Lannon from the beginning of the 1996-97 school year and continued until February 11, 1998.

Schroeder's problems did not subside with his transfer to Lannon. In 1997, the tires on his car were slashed at his house. In August of that year, a document entitled "Facts That Will Affect Our Children" was circulated. Part of the document read: "Mr. Schroeder openly admitted at a district meeting that he was homosexual. Is that a good role model for our 5, 6, and 7 year old children?" The fact that the plaintiff is gay led at least one parent to actually remove his child from Schroeder's class. Schroeder also began to hear that staff and parents were calling him a pedophile. One student's parents' fear that Schroeder was a pedophile led defendant Richard Ladd, Who was Lannon's principal, to raise the possibility of "proximity supervision" of the student.

On February 11, 1998, Schroeder had what he calls a "mental breakdown" and had to leave school. When Schroeder returned a couple of weeks later, Ladd gave him a four page critical letter. The District terminated Schroeder's employment by a letter dated March 10, 1999.

Although they knew of the harassment that the plaintiff had been suffering, none of the defendants ever made a public statement in support of Schroeder. The schools did not use the several "class expectation talks" or school assemblies as opportunities to discuss sexual orientation harassment or the anti-gay comments that were being made about Schroeder. Further, despite Schroeder's request and suggestion, the District never held an inservice or otherwise provided training devoted primarily to sexual orientation harassment. The District did, however, hold inservices devoted to sexual harassment and racial discrimination.

Again, the preceding facts are uncontested. In Opposing the defendants' summary judgment motion, the plaintiff has also contested several of the defendants' factual assertions and has asserted additional facts of his own. The additional facts presented by the plaintiff follow.

Schroeder alleges that, during the 1995-96 school year, a student "said something similar to "I am going to kill that faggot, Schroeder.'" Schroeder also contends that, while "he did not report every single incident of anti-gay and homophobic harassment that he suffered, [he] did report[ ] dozens of such incidents to his superiors and the administration." Nonetheless, "there were incidents where students were not punished and the District never addressed the larger issue of gossip, cat-calling and innuendo. . . In addition, there was at least one incident where the District failed to investigate a reported incident."

Schroeder also asserts that:

[t]he District failed to take concrete, specific and effective steps to prevent anti-gay harassment of Schroeder during bus duty. Polcynski, for example, admits that, if it had been a female teacher being continuously taunted with the word "cunt," she would have punished students who were identified, informed the Principal of the situation, talked to the bus driver to identify students and she would have called student witnesses individually into her office for private

questions in an effort to identify the misbehaving students. Polcynski never took these actions in Schroeder's case.

Schroeder makes several allegations with respect to one of the graffiti incidents described above. He admits that the administration identified and punished the students who were responsible for the graffiti. He argues, however, that the administration's actions were inadequate, as they "failed to deal [with] and prevent the resulting surge of gossip, comments and anti-gay harassment that Schroeder then suffered." Schroeder contends that this particular graffiti incident was not handled in the same manner as were other similar incidents. More specifically, he asserts (1) that while this type of problem typically would have been the responsibility of then-Associate Principal Crowley, this particular incident was handled by then-Principal Hicklin, who was a weak disciplinarian; (2) that the graffiti was not photographed in this instance as it usually is; (3) the students were punished for vandalism, but not for the content of the graffiti; (4) the students were not made to pay for the clean-up, as was done on at least one other occasion; (5) the students were not made to apologize for their behavior; and (6) while a student's parents are typically called after such an incident, Schroeder talked to the parents of one of the students and was told that they had not been called.

Schroeder also contends that, despite his complaints and the defendants' consequent knowledge of the harassment he had been suffering, the administration denied his requests (1) for a transfer to a different school within the district, and (2) for reassignment from bus duty.

Finally, Schroeder disputes the defendants' claim that "in-services were conducted on harassment, including sexual orientation, in the 1996-1997 and 1997-1998 school years." According to Schroeder, in the course of the two in-services conducted by the Hamilton School District, "sexual orientation harassment was only discussed when Schroeder raised his hand, stood up and asked about anti-gay harassment. Neither in-service was solely or even primarily

about sexual orientation harassment."

In short, Schroeder alleges, and the defendants do not deny, that he suffered a series of admittedly unfortunate and offensive insults. The disagreement between the parties is mainly over the nature and effectiveness of the defendants' responses to those incidents.

II. LEGAL STANDARDS

A. Summary Judgment Standard

Fed. R. Civ. P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions On file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The nonmoving party may not rest solely upon the allegations set forth in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. See Liu v. T & H Machine, Inc., 191 F.3d 790, 794-95 (7th Cir. 1999); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The genuine factual disagreement must be one involving a "material" fact; disagreement over irrelevant or unnecessary facts does not foreclose summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The nonmovant has failed to demonstrate a genuine issue of material fact if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. . ." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Finally, "[a]lthough we must, for purposes of summary judgment review, draw any inferences from the record in favor of [the plaintiff], we are not required to draw every conceivable inference from the record. We need draw only reasonable ones." Tyler v. Runyon, 70 F.3d 458, 467 (7th Cir. 1995) (quoting Spring v. Sheboygan Area School dist., 865 F.2d 883, 886 (7th Cir.1989).

In Celotex, the Court explained that "the plain language of Rule 56(c) mandates the entry of summary judgment. . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Addressing a motion for summary judgment therefore requires a court to examine the nature and elements of the underlying cause of action.

B. Section 1983 Liability

Schroeder alleges that the defendants violated 42 U.S.C. § 1983 by discriminating against him on the basis of his sexual orientation. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper prorreding for redress. . . . .

Enacted as part of the Ku Klux Klan Act in 1871, § 1983 provides a civil remedy for individuals who have suffered deprivations of Constitutional 'rights privileges, or immunities" at the hands of officials acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia." 42 U.S.C. § 1983 The statute is intended both to deter state violations of individuals' federal rights and to provide compensation for those who have been deprived of their rights. See Carey v, Piphus, 435 U.S. 247 (1978).

A threshold requirement for any § 1983 claim is that the plaintiff show that the defendants acted under color of state law. See Webb v. City of Chester, Illinois, 813 F.2d 824, 828 (7th Cir. 1987). "Color of law is determined by the relationship between the defendant's misconduct and the

power, authority and dutiet conferred by the state." Rouse v. City of Milwaukee, 921 F.Supp. 583, 588 (E.D. Wis. 1996) (citing Polk County v. Dodson, 454 U.S. 312, 321 (1981).

While § 1983 speaks in terms of "persons" being liable for deprivations of rights, the statute applies as well to government bodies. The Supreme Court explained the nature of governmental liability in Monell v. Department of Social Services, 436 U.S. 658, 690 (1978):

[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, . every. . . § 1983 "person," by the very nature of the terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

The Court explicitly rejected the notion that a government body could be held liable under a respondeat superior theory. That is, the mere fact that an individual who is alleged to have acted unconstitutionally is a public employee does not subject the governmental body to liability under § 1983. See id at 691.

C. Equal Protection

Section 1983 imposes liability for the deprivation of specific constitutional or statutory rights. Schroeder claims that the defendants are liable under § 1983 for depriving him of his Fourteenth Amendment right to the equal protection of the laws. The Equal Protection Clause grants citizens "the right to be free from invidious discrimination in statutory classifications and other governmental activity." Harris v. McRae, 448 U.S. 297, 322 (1980). To establish liability under § 1983 for an equal protection violation, the plaintiff must show (1) that the defendants treated him differently, (2) that the differential treatment he received was the result of intentional discrimination based on his membership in a

particular class, and (3) that the discriminatory treatment was not rationally related to a legitimate state interest. See, e.g., Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996).

1. Disparate Treatment and Discriminatory Intent

To be successful on an equal protection claim, the plaintiff must show disparate treatment based on his membership in a particular group. Discrimination based merely on individual, rather than group, reasons will not suffice. See New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990)(emphasis in original). Nor does official action violate the Equal Protection Clause merely because it disproportionately impacts a particular group. Proof of an equal protection violation requires proof of discriminatory intent or purpose.fn2 See Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 264-65 (1976). To demonstrate discriminatory purpose, the plaintiff must do more than show that the defendant was aware that its decisions or actions would have particular consequences. Rather, discriminatory purpose "implies that the decisionmaker. . . selected or reaffinned a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group." Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). The plaintiff must show that the defendants acted either intentionally or with deliberate indifference; a mere showing of negligence is insufficient. Nabozny, 92 F.3d at 454. While the plaintiff is not required to prove that a challenged action was taken solely or even primarily for discriminatory purposes, he must show that his membership in a particular

group was a "substantial" or "motivating" factor. See Hunter v. Underwood, 471 U.S. 222, 228 (1985); Arlington Heights, 429 U.S. at 296.

2. Levels of Equal Protection Review

The Supreme Court has established three levels for reviewing official action alleged to violate the Equal Protection Clause: strict scrutiny; intermediate scrutiny; and rational basis review. The degree to which a court is to scrutinize particular governmental action (be it legislative or executive action) is dictated by two factors: (1) the right or rights implicated by the challenged action; and (2) the basis upon which the challenged governmental action classifies members of the citizenry. Courts are to apply the highest level of scrutiny, or "strict scrutiny," to those government actions that either implicate a fundamental right or classify citizens on the basis of race, alienage, or national origin. See City of Cleburue v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Factors such as race and national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy- a view that those in the burdened class are not as worthy or deserving as others." Id. Accordingly, governmental actions that draw distinctions on such bases are upheld only when they are narrowly tailored to further a compelling state interest. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

Courts are to apply an intermediate, or "heightened", level of scrutiny to governmental actions that classify citizens on the basis of gender. See Cleburne, 473 U.S. at 440. Sex is an "immutable characteristic determined solely by the accident of birth [and] frequently bears no relation to ability to perform or contribute to society." Fronticro v. Richardson, 411 U.S. 677, 686-87 (1973). A challenged official action will survive heightened scrutiny if the government can show that the action is substantially related to an important governmental objective. See United States v. Virginia. 518 U.S. 515, 533 (1996)(citing Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982).

A governmental action which neither implicates a fundamental right nor distinguishes among citizens on the

basis of suspect or quasi-suspect classifications is subject to the most deferential standard of equal protection review. Such an action "is presumed to be valid and will be sustained if the classification drawn by the [challenged action] is rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440. Rational basis review is much less demanding than either strict or heightened scrutiny, both in terms of the justifying state interest that must be involved and in terms of the "fit" between that interest and the means employed to further it. Nonetheless, ¼ [b]y requiring that the classification bear a rational relationship to an independent and legitimate [governmental] end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the [governmental action]." Rower v. Evans, 517 U.S. 620, 633 (1996).

The Supreme Court described the parameters of rational basis review in Heller v. Doe, 509 U.S. 312 (1993), explaining that "rational- basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of [governmental] choices.'" Id. At 319 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Under rational basis review, the government has no obligation to produce evidence to sustain the rationality of a. . . classification. . . . [Because] a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity, [t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record.

Heller 509 U.S. at 320 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). A court will find "no constitutional violation if 'there is any reasonably conceivable state of facts' that would provide a rational basis for the government's conduct." Nabozny, 92 E3d at 458 (quoting Beach Communications, Inc., 508 U.S. at 313-314).

The defendants herein argue that, "because homosexuals are neither a suspect nor a quasi-suspect class, decisions made

and actions taken by the District are only subject to a rational basis review test." A careful reading of Nabozny, which the defendants cite in support of their assertion, and of other binding authority casts some doubt upon the defendants' contention. Romer v. Evans, 517 U.S. 620 (1996), involved a state constitutional amendment that (1) repealed existing statutes, ordinances, and policies that prohibited discrimination on the basis of sexual orientation and (2) barred any state governmental entity from adopting policies prohibiting discrimination based on sexual orientation. After explaining the contours of rational basis review, the Court held that the amendment "fail[ed], indeed defie[d], even this conventional inquiry." Romer, 517 U.S. at 632 (emphasis added). The language of the opinion may suggest that, because the amendment failed even rational basis review, the Court saw no need to decide whether classifications on the basis of sexual orientation targeted a suspect class and thereby triggered strict scrutiny.

Similarly, in Nabozny the Seventh Circuit indicated that, because the official behavior in question could not survive rational basis review, that standard was "sufficient for our purposes herein." Nabozay, 92 F.3d at 458. The court actually made it explicit that it was expressing no opinion on whether sexual Orientation is an 'obvious, immutable, or distinguishing' characteristic" that triggers strict or heightened scrutiny. Id. at 457 n. 10, 458. In fact, the court may have signaled a potential willingness to recognize the immutability of sexual orientation (and to therefore more closely scrutinize discrimination on the basis of sexual orientation), noting that "it does seem dubious to suggest that someone would choose to be homosexual, absent some genetic predisposition, given the considerable discrimination leveled against homosexuals." Id. at 457 n. 10.

While the Seventh Circuit has held that discrimination on the basis of sexual orientation is subject to rational basis review, that holding was in the context of discrimination in the military. See Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). The military context

entails unique considerations that counsel in favor of special deference to administrative action. See, e.g., Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994)(citing Goldman v. Weinberger, 475 U.S. 503, 509 (1986)). All that can be said with certainty is that any state action that draws distinctions among individuals on the basis of sexual orientation must, at a minimum, be rationally related to a legitimate governmental objective

III. ANALYSIS

That Schroeder has suffered harm, even if that harm is the result of defendants' failure to prevent it, is not proof of an equal protection violation. Because "the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action," Indianapolis Minority Contractors Ass'n, Inc. v. Wiley, 187 F.3d 743, 752 (7th Cir. 1999), Schroeder must show that actions taken or not taken by the defendants were the result of a conscious decision to accord him different treatment because of his sexual orientation.

That Schroeder was not reassigned from bus duty and that he was twice denied transfers that he had requested do not in themselves support a finding of invidious discrimination. Schroeder provides no evidence concerning the treatment of such requests when made by non-homosexuals. The absence of any such evidence constitutes a severe failure of proof with respect to both differential treatment and intentional discrimination on the basis of sexual orientation.

The same can be said about several of the plaintiff's other assertions, including his contentions that the defendants failed "to take concrete, specific and effective steps to prevent anti-gay harassment of Schroeder" and to investigate and punish each and every instance in which a student was overheard making or writing an inappropriate remark about Schroeder. At times, the plaintiff appears to be taking the position that the defendants are liable merely because the disciplinary and investigative measures they took were less

than 100 percent effective. Such a position may be more consistent with a type of "failure to protect" due process claim (a claim not asserted by the plaintiff, and one that would present the plaintiff with additional, likely insurmountable obstacles fn3) than an equal protection claim. Perhaps such assertions would also aid in establishing that defendants were negligent in their response to Schroeder's complaints. A mere showing of negligence will not, however, support an equal protection claim. Nabozny, 92 F.3d at 454.

The principal deficiencies in this action are illuminated by an examination of the decision in Nabozny, the leading Seventh Circuit case on § 1983 liability for equal protection violations in the public school context Nabozny involved a student who was subjected to regular harassment and physical abuse beginning when he was in the seventh grade and lasting for approximately four years. The onset of the abuse, which included being regularly referred to as "faggot" and being hit and spit upon, followed closely after the student, Nabozny, revealed that he was gay. Nabozny reported the abuse shortly after it began, and he was promised by the school's principal that he would be protected. Despite her promise, the principal took no action. See Nabozny, 92 F.3d at 451.

The abuse Nabozny suffered soon worsened. Two students in a science classroom pushed Nabozny to the floor, held him down, and performed a mock rape on him while they exclaimed that Nabozny should enjoy it. Twenty students watched the mock rape and laughed. Nabozny escaped and fled to the principal's office, where he received what the court correctly described as an "astonishing" response: the principal told Nabozny that "boys will be boys" and that he should expect such behavior from his fellow students if he was "going to be so openly gay." Id. Again, no action was taken against the students responsible for the assault.

Shortly after Nabozny entered the eighth grade, he was physically attacked in a school bathroom. The principal told Nabozny and his parents that Nabozny should expect such

behavior since he is openly gay. Once again, the principal pledged to take action against the perpetrators, and once again nothing was done. The pattern was repeated several times while Nabozny was in the eighth and ninth grades: following incidents of abuse (which at times included being pelted with dangerous objects such as steel nuts and bolts and being pushed into bathroom urinals), Nabozny and his parents would meet with the school's principal, who then would promise to take action but ultimately fail to act.

As the court explained,

[t]he worst was yet to come, however. One morning when Nabozny arrived early to school, he went to the library to study. The library was not yet open, so Nabozny sat down in the hallway. Minutes later be was met by a group of eight boys led by Stephen Huntley. Huntley began kicking Nabozny in the stomach, and continued to do so for five to ten minutes while the other students looked on laughing.

Id. at 452. Nabozny reported the incident to the assistant principal, who was in charge of disciplining students. The assistant principal "laughed and told Nabozny that Nabozny deserved such treatment because he is gay. Weeks later Nabozay collapsed from internal bleeding that resulted from Huntley's beating." Id.

Nabozny and his parents ultimately were told by one of the school's guidance counselors "that school administrators were unwilling to help [Nabozny] and that he should seek educational opportunities elsewhere." Id.

Nabozny filed suit against the school district and several of its administrators, alleging, inter alia, that the defendants were liable under 42 U.S.C. § 1983 for violating his right to equal protection of the law. The district court entered summary judgment in favor of the defendants, and the Seventh Circuit reversed.

Several things are evident when the facts in Nabozny are compared with those in this case. First, the nature and extent of the harm suffered by Schroeder is not the same as that suffered by Nabozny. It is admittedly difficult to qualify or to quantify the subjective suffering experienced by an individual, and the court in no way means to make light of the harm that

Schroeder suffered. From as objective a point of view as is possible, however, it does appear that the harm suffered by Nabozny was greater than that suffered by Schroeder. Nabozny was subjected to repeated physical abuse, while Schroeder was subjected to none. The fact that the abuse Naboany suffered occurred white he was of middle school and high school age – already an awkward and precarious time in the lives of most – made it all the more harmful.

All of this is not to say that what Schroeder had to endure was trivial; it surely was not. The significance of the discrepancies between Schroeder's situation and that of Nabozny ties in how strongly the respective cases called out for action by the respective defendants. The more egregious the abuse suffered by the respective plaintiffs, the more difficult it would be to maintain that any inaction (or only half-hearted action) by the respective defendants was not a deviation from ordinary practice.

An even more significant difference between Nabozny and the present case lies in the different responses of the defendants in the two cases. While taking no action in the wake of reported incidents of harassment and abuse was the exception in this case, in Nabozny it was the rule. In Nabozny, the court found that essentially every reported incident of harassment and abuse was met with complete inaction on the part of the defendants. The court's opinion teacher involved to see if that teacher could identify either the responsible students or any other students who may have been witnesses. Polczynski also said she "might talk to the bus driver and see if – the bus driver – could identify the student." Polczynski Deposition at p. 180. The deposition

testimony that the plaintiff cites does not demonstrate that Schroeder's case was handled differently. Polczynski testified that, when the students could be identified, they were removed from the bus and questioned. She also testified that, when the students could not be immediately identified, she did not remove every student from the bus (which typically would have been about 60 students) and question them individually. Polczynski did not, however, testify that she would have questioned each student on the bus in the hypothetical case involving the female teacher. She indicated only that, assuming that student witnesses could be identified, she would call them into her office. In Schroeder's case, despite the aid of a yearbook, it does not appear that he was able to identify either the offending students or any witnesses. Polczynski Deposition at p. 213.

Schroeder also alleges that the graffiti incident was not handled in the way other, similar eases were. He claims that the treatment of this incident deviated from the typical treatment in the following respects: (1) while similar incidents were typically handled by Associate Principal Crowley, this incident was handled by Principal Hicklin; (2) in this instance, the graffiti was not photographed; (3) the students were punished for the vandalism, but not for the content of the graffiti; (4) the students were not required to pay for cleaning up this graffiti; (5) the students were not made to apologize for their behavior; and (6) the students' parents were not called.

There are several problems with the evidence plaintiff cites in support of these contentions. Some of his contentions as to standard practice in the district are essentially selfserving assertions, supported only by the deposition of Schroeder himself. Other assertions are supported only by evidence that the court may not consider. For example, the plaintiff supports his assertion that the parents of the students responsible for this particular graffiti incident were not called simply by stating that "Schroeder talked to one of the student's parent and they had not been contacted." The parents' statement to Schroeder is hearsay and is

inadmissible at trial. The plaintiff may not, therefore, rely on the statement in attempting to establish the existence of a material factual dispute. See Fed. R. Civ. P. 56(e). In short, the plaintiff has failed to make a showing sufficient to enable a reasonable trier of fact to find that he was treated differently.

Schroeder has made even less of a showing that any differential treatment he may have received was the result of intentional discrimination based on his sexual orientation. Schroeder does claim that defendant Polczynski responded to one of Schroeder's complaints by saying "boys will be boys." The same comment was made by a school principal in Nabozny. In Nabozny, however, the principal followed that statement by telling Nabozny that he should "expect" his fellow students to abuse him if he was "going to be so openly gay." Nabozny, 92 F.3d at 451. In fact, the principal on several occasions told Nabozny and his parents that, because he is gay, Nabozny should expect abusive and harassing behavior from fellow students. See id. at 451-52. Further, the assistant principal, after Nabozny was brutally beaten by a fellow student, "laughed and told Nabozny that Nabozny deserved such treatment because he is gay." Id. at 452. The record in the present case is devoid of any similar evidence so directly linking the plaintiff's sexual orientation to any action or inaction by the defendants. To be sure, evidence directly supporting a claim of intentional discrimination is rare. See Courtney v. Biosound, Inc., 42 E3d F.3d 418 (7th Cir. 1994). But the lack of any direct evidence, combined with the lack of circumstantial evidence such as a pattern of disparate treatment,fn4 renders the plaintiff's showing insufficient. The plaintiff has not, in short, made a showing sufficient to establish the existence of disparate treatment and intentional or deliberately indifferent action motivated by the plaintiff's sexual orientation.

The entry of summary judgment in favor of defendant Hamilton School District is further supported by the plaintiffs failure to make a showing sufficient to establish widespread discriminatory practices" that, while not authorized by law,

are so "permanent and well sealed as to constitute a 'custom or usage' with the force of law." Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970).

In sum, the plaintiff unquestionably was harassed by students. He has not, however, presented sufficient evidence to enable a jury reasonably to find that it is more likely than not that (1) the defendants treated him differently than they did other staff members; and (2) any such differential treatment was the result of the defendants' conscious decision to discriminate against Schroeder, or to be deliberately indifferent to his complaints, because of his sexual orientation. With respect to defendant Hamilton School District, the plaintiff has also failed to make a showing sufficient to establish, by a preponderance of the evidence, that such discrimination was so "permanent and well settled as to constitute a 'custom or usage' with the force of law." City of Canton, Ohio v. Harris, 489 U.S. 378, 398 (1989) (quoting Adickes, 398 U.S. 144, 168 (1970). The plaintiff would bear the burden of proving each of these elements at trial, and "the plain language of Rule 56(c) mandates the entry of summary judgment. . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 317. Put differently, based on the record as a whole, no rational trier of fact could find for the plaintiff. The court therefore grants the defendants' motion for summary judgment.

Because summary judgment will be entered in favor of the defendants, the remaining motions in this action are denied as moot.

IV. CONCLUSION

In conclusion, and for all of the foregoing reasons, the court grants the defendants' motion for summary judgment. The court also denies as moot (1) the defendants' motion in limine to bar testimony by Ellen Bravo, (2) the defendants'

motion in limine to limit the testimony of Dr. Paula Linden, and (3) the plaintiff's motion for summary judgment.

NOW THEREFORE IT IS OEDERED that the defendants' motion for summary judgment be and hereby is GRANTED.

IT IS FURTHER ORDERED that the defendants' motion in limine to bar testimony by Ellen Bravo be and hereby is DENIED as moot.

IT IS FURTHER ORDERED that the defendants' motion in limine to limit the testimony of Dr. Paula Linden be and hereby is DENIED as moot.

IT IS FURTHER ORDERED that the plaintiffs motion for summary judgment be and hereby is DENIED as moot.

SO ORDERED this 16th day of March 2001, at Milwaukee, Wisconsin.

WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge

Footnotes

fn1Paragraph 9 of the Plaintiffs Facts states that Ms. Crowley was the Associate Principal during the 1994-95 school year and the defendants do not disagree with this statement of fact in their responsive brief. Paragraph 10 of the Defendant's Proposed Findings of Fact and Conclusions of Law, however, states that Patty Polczynski was the Associate Principal during that time.

fn2 Of course, disparate impact is often highly relevant in discerning the existence of discriminatory intent. See Arlington Heights, 429 U.S. at 264-65; Davis, 426 U.S. at 242.

fn3 In DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 200 (1989), the Supreme Court held that, absent

a "special relationship", a state actor has no affirmative duty to protect an individual from harm. The Court explained that "[t]he affirmative duty to protect arises. . . from the limitation which (the state] has imposed on [a person's] freedom to act on his own behalf." DeShaney, 489 U.S. at 200. The Seventh Circuit has since held that, under DeShaney, the relationship between school administrations and students is not one that gives rise to an no affirmative duty of the former to protect the latter. J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272-73 (7th Cir 1990). Under the legal framework established by DeShaney and Alton, it is doubtful whether in the present case the defendants had an affirmative duty to protect the plaintiff. If no special relationship exists between a school administration and its students, it is quite unlikely that one exists between a school administration and its employees.

fn4That is, the plaintiffs lack of evidence of disparate treatment by the defendants is enough in itself to entitle the defendants to summary judgment. Because disparate treatment often constitutes circumstantial evidence of discriminatory intent, that lack of evidence also has implications for the plaintiffs showing with respect to purposeful discrimination.

01-1906

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TOMMY R. SCHROEDER,
Plaintiff-Appellant,

v.

HAMILTON SCHOOL DISTRICT, et al,
Defendants-Appellees.

Decided May 17, 2002

Appeal from the United States District Court for the
Eastern District of Wisconsin – No. 98 C 1270 –
William E. Callahan, Jr.

Before POSNER, MANION, EVANS, Circuit Judges.

CALLAHAN, Magistrate Judge

ORDER

Plaintiff-Appellant filed a petition for rehearing en banc on March 25, 2002. After consideration of the petition and the answer thereto filed on April 17, 2002, a vote of the active members of the court was requested. The petition for rehearing en banc was denied by a majority of the court. fn1 A majority of judges on the original panel voted to deny rehearing. The petition for rehearing is therefore DENIED.

Footnotes

fn1 Circuit Judges Rovner, Diane P. Wood, and Williams voted to grant rehearing en banc.

02-254

No. ~~01-1325~~

Supreme Court, U.S.
FILED
SEP 16 2002
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In The

Supreme Court of the United States

TOMMY R. SCHROEDER,

Petitioner,

v.

HAMILTON SCHOOL DISTRICT, GARY AMOROSO, DEAN SCHULTZ, RICHARD LADD, KATHLEEN COOKE, KEITH HICKLIN, and PATTY POLCZYNSKI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1. Whether a Title VII analysis shall be used in §1983 cases where sexual orientation hostile work environment discrimination in employment is the basis for the claimed Equal Protection violation.

2. Whether the Respondents denied Schroeder the equal protection of the law by intentionally discriminating against him because he is gay.

PARTIES TO THE PROCEEDING

In addition to the current parties named in the caption, the following were previously parties in this action:

1. Kris Wetherall, employed by respondent Hamilton School District as a teacher at Lannon Elementary School.

2. Katherine Crowley, employed by the respondent Hamilton School District as an Assistant Principal Activities Coordinator at Templeton Middle School.

On September 25, 2000, pursuant to a stipulation between the parties, the District Court for the Eastern District of Wisconsin entered an order dismissing Kris Wetherall and Katherine Crowley.

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OPINIONS BELOW

The May 17, 2002 denial by the United States Court of Appeals for the Seventh Circuit of the petition for rehearing or rehearing en banc can be found in the appendix attached to Schroeder's petition for a writ of certiorari at App. 49a.

The March 11, 2002 three-judge panel opinion of the United States Court of Appeals for the Seventh Circuit is located at App. 1a-26a. The majority opinion affirmed the United States District Court for the Eastern District of Wisconsin's grant of summary judgment to the respondents.

The March 16, 2001 opinion of the United States District Court for the Eastern District of Wisconsin is located at App. 27a-48a. The District Court granted summary judgment to the respondents.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Wisconsin granted summary judgment in favor of respondents on March 16, 2001. The United States Court of Appeals for the Seventh Circuit affirmed the decision on March 11, 2002. A petition for rehearing by the panel or, alternatively, for rehearing en banc was denied by the United States Court of Appeals for the Seventh Circuit on May 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution declares that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Section 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively

> to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title VII of the Civil Rights Act of 1964 as amended, November 21, 1991, 42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Petitioner Tommy R. Schroeder filed this action pursuant to 42 U.S.C. §1983 claiming a violation of his right to equal protection under the Fourteenth Amendment of the United States Constitution. Schroeder was a teacher in the Hamilton School District, which is the principal respondent. Individual respondents are the School District administrator and various administrative staff including school principals and human resource directors. Schroeder's complaint is expansive but alleges only a claim for denial of equal protection under 42 U.S.C. §1983. The complaint makes no reference or claim for a violation of Title VII (42 U.S.C. §2000e, et seq.).

In substance, Schroeder claims that he was harassed by students during the course of his teaching duties first at a middle school and then at an elementary school in the Hamilton School District. The respondents (hereinafter the "District") moved for summary judgment seeking dismissal of Schroeder's complaint on the basis that no

reasonable jury could find that the District had intentionally discriminated against Schroeder because of his sexual orientation. Schroeder also moved for summary judgment arguing, in part, that Title VII analysis should apply to his equal protection claim under 42 U.S.C. §1983.

By decision and order dated March 16, 2001, the United States District Court for the Eastern District of Wisconsin granted the District's motion for summary judgment and denied Schroeder's motion. The District Court held that "based on the record as a whole, no rational trier of fact could find for the plaintiff." App. 46a. A judgment of dismissal was entered on March 19, 2001. Schroeder appealed.

On March 11, 2002 a three-judge panel opinion of the United States Court of Appeals for the Seventh Circuit affirmed the District Court's analysis and decision that based upon the record, no reasonable jury could find that the defendants intentionally denied Schroeder equal protection of the law because he is gay. Schroeder's petition for rehearing or rehearing en banc was denied on May 17, 2002.

A. RESPONSE TO SCHROEDER'S STATEMENT OF THE CASE

Respondents herein address those portions of Schroeder's statement of the case which they perceive contains misstatements or requires clarification. The "facts" set forth in the petition have already been discussed by the

District Court, the Seventh Circuit (App. 2a-6a)[1], as well as in respondents' prior briefs. Schroeder continually refers to his own testimony or self-serving documents which he created to support his position. For example, his frequent reference to Exhibit 3 is a summary which he prepared and gave to his attorneys. (R. 98A, pp. 27-30).

Although Schroeder states he received a death threat in 1989, he fails to include that he testified at deposition in this matter that the alleged threat was made by an eighth grader, apparently heard by no one, and that Schroeder did not reprimand the student or report it to the school administration or even to fellow teachers. (R 98A, p. 143). The alleged death threat in 1996 was not heard by Schroeder but only, according to his own testimony, reported to him by a fellow teacher, Maxine Kaye. (R. 98A, p. 144). The District Court correctly noted that Schroeder cannot rely upon hearsay to oppose a motion for summary judgment. (App. 44a-45a). Nonetheless, Maxine Kaye testified at deposition that it "did not happen".

With regard to the 1993 graffiti incident in the boy's bathroom, support is found only in Schroeder's summary. He never reported it to anyone at the time it allegedly occurred or thereafter. Likewise, if he ever found other graffiti, by his own admission he never reported it to the District administration. (R. 98A, p. 159). The 1994 bathroom graffiti incident has been discussed at some length by the District Court and the Seventh Circuit. It is uncontroverted

[1] All references in this petition to "App." followed by a number or numbers are intended to refer to a page or pages in the appendix to Schroeder's petition for a writ of certiorari.

that the two students involved were caught and disciplined. (R. 98A, pp. 67-71).

Occasionally Schroeder did receive taunts from students or from others anonymously at home over the phone. However, whenever he reported the incidents and the taunters could be identified, they were disciplined. Further, Schroeder admits he often assumed, but did not know, that the anonymous callers were parents of Hamilton students. (R. 98A, p. 153, relating his "gut feeling"). On one occasion, he first told Assistant Principal Patty Polczynski that he received a harassing phone call at home from a student but later changed his mind and said the caller actually sounded older and could not be identified.

Schroeder has also admitted in his deposition testimony that he refused to disclose names of staff members who he claimed had harassed him on occasion. (R. 98A, p. 158). Likewise, Schroeder admitted in his deposition that he did not report to the District administration all comments by parents either overheard or related to him by others. (R. 98A, p. 145).

Principal Hicklin confirmed that Schroeder refused to tell him the names of staff that were allegedly harassing Schroeder in April of Hicklin's last year as principal. (AE App., p. 29)[2]. When Schroeder reported to him that he had received harassing telephone calls at his home, Hicklin asked to hear a recording of the calls. (AE App., pp. 29-31).

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[2] All references in this petition to "AE" followed by a number or numbers are intended to refer to a page or pages in the Respondents' Seventh Circuit Appendix.

Hicklin then tape recorded them, and played the tape for the police liaison officer at the school. (AE App., p. 30). The liaison officer told Hicklin that there was nothing he could do because the tape was undistinguishable and there was no type of identifying characteristic. *Id.*

When Schroeder complained to Hicklin that a child was calling him names from the bus, Hicklin boarded the bus, and identified the culprit as a high school student. Hicklin then promptly reported the incident to the high school for discipline. (R. 98A, p. 317). The same was true when name calling from buses was reported to then Associate Principal Patty Polczynski. When students could be identified, they were disciplined. (R. 98A, p. 251). When high school students were involved, the high school administration was contacted to discipline their students. (R. 98A, pp. 250-251). For example, after Schroeder complained to Polczynski in March 1996 about high school students calling him names from the bus, Polczynski called the high school twice and contacted the bus company to speak with the bus driver. (R. 98A, p. 59). On another occasion, Polczynski boarded the bus and followed through with a call to the high school regarding one of the students. (R. 98A, p. 59). There were about 60 kids on each bus, about 40-45 of whom attended Templeton Middle School. In most instances, Schroeder did not know who had made the comments. However, Polczynski also had Schroeder look at a yearbook in an effort to identify the students who were responsible. (R. 98A, p. 251).

Regarding his transfer from Templeton Middle School to the elementary school, Schroeder first requested a transfer in June 1994. However, the bargaining agreement between Schroeder's union and the District required all transfers to be submitted no later than April 15, 1994. (R.

98A, p. 160). The 1994 transfer request by Schroeder simply indicated he wanted to work with younger children. He did not base his request for transfer on any claim that he was being harassed in any respect. (R. 98A, p. 161). There was no transfer request for the following school year, 1995. However, it is undisputed that Schroeder submitted a timely transfer request for the 1996-1997 school year, which was granted by the District.

Although Schroeder acknowledges that he had numerous meetings with various administrators in regard to his complaints, nonetheless, he claims that in one such meeting Patty Polczynski made the comment that "boys will be boys." It is perhaps curious that Schroeder himself does not include those words in his self-serving summary (R. 98A, pp. 27-30, Exh. 3), and it is perhaps even more curious that the quoted words are taken in full from *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996), which Schroeder had a copy of. Further, Schroeder's citation to the record in regard to these comments is more than confusing. In respect to the above claimed statement by Polczynski, Schroeder cites to Exhibit 39 (R. 98A, p. 35) which is a letter Schroeder wrote to Polczynski. The letter never mentions the comment and in fact concludes with Schroeder stating to Polczynski, "Thanks for your past support and I hope I can depend on that in the future." Schroeder's own letter is further evidence and an admission that rather than being deliberately indifferent to Schroeder's complaints, the administration was supportive and concerned. Furthermore, Schroeder's reference to the record at 98C, p. 279, is to Patty Polczynski's deposition transcript which recounts a meeting with Schroeder where she said, "My personal professional goal is to increase appreciation for diversity. I shared that with Mr. Schroeder."

Ms. Polczynski's goal is completely opposite to any notion of deliberate indifference.

Furthermore, the record thoroughly reviewed by the District Court and affirmed by the Seventh Circuit, contains evidence of the District's direct and expeditious response to taunts by students. For example, Polczynski on more than one occasion met with Schroeder to discipline a particular student and to keep Schroeder informed of the discipline. (See, for example, R. 98C, pp. 261-267). (We also note parenthetically that Schroeder's claim in his petition (p. 3) that an administrator "angrily shouted" at him is not found in the record as cited by him as support for this statement.)

The memorandum of August 1997 to which Schroeder refers to was anonymous and not circulated. Only one parent was known to have received the anonymous memorandum and that parent passed it on to Schroeder who provided it to the administration. (R. 98A, p. 163). The District investigated who wrote the memorandum but the author could never be determined. (Earlier in this lawsuit Schroeder sued a fellow teacher, Kristine Wetherall, alleging that she wrote the memo based upon his "gut feeling" (AE App., p. 22); he later voluntarily dismissed that claim on its merits. (AE App., pp. 95-96)).

The first person Schroeder talked to about the memorandum was Karen Thompson, a fellow teacher with whom Schroeder would be teaching a "blended classroom" of first and second graders in 1998. (AE App., p. 21). The principal at Lannon Elementary School, Mr. Ladd, did not recall receiving a copy of the document, but heard about it during a meeting with Superintendent Dr. Cooke. (AE App., pp. 89-90). Ladd, Cooke, Schroeder, and Thompson

met to discuss the course of action to take and to discuss the upcoming parent meeting for parents of the students who would be in the blended classroom. (AE App., p. 90).

Plans were formed for the upcoming parent meeting regarding the blended classroom. The District developed a specific agenda for the parent meeting so that it would remain controlled; a strategy was developed in case any specific questions were raised about Schroeder; a strategy was also planned to alert the sheriff's department and to have them in the area during the meeting if some trouble should develop; a further strategy was planned regarding which district staff would attend the meeting. (AE App., pp. 65-67). Dr. Cooke arranged to be in her office so as to be available at a moment's notice, and two district staff members attending the meeting would have cell phones to use, if necessary, during the meeting. *Id.* It would have been highly unusual for Dr. Cooke, as the Superintendent, to have attended such a meeting. (AE App., p. 66).

Statements were also planned, if the letter had become public (it was not determined that anyone other than Schroeder's friends had received the letter) that would be supportive of Schroeder. (AE App., pp. 66-67). There was never an intent to discuss Schroeder's sexual orientation at the meeting because it would not have been appropriate, since the focus of the meeting was on the blended classroom and not on Schroeder. (AE App., p. 68). The meeting took place without incident of any type.

The District investigated who might have written the letter about Schroeder and the blended classroom, but no one, including Schroeder, was ever able to identify who wrote it. (AE App., pp. 69-70). Despite these efforts, and considering that the administration did not want to spread

news of the letter since only very few people had received it or were even aware of it, the person who wrote the letter remains unknown.

The District administration took what can only be described as extraordinary measures to protect Schroeder, both personally and physically, from any "fallout" from the letter, and to ensure his safety at the meeting. The apathy and deliberate indifference that Schroeder portrays in his complaint and argues to this Court relative to this incident and others, is simply inaccurate and totally misleading. The District Court agreed concluding that although Schroeder may disagree with the level of response, nonetheless, no reasonable trier of fact could find for Schroeder. (App. 22a-24a). The record in this matter is simply devoid of any evidence of intentional discrimination against Schroeder on the part of the District or any of the individual defendants. Schroeder was not treated with any level of indifference, deliberate or otherwise. When Schroeder reported incidents, including telephone calls that he received at his home rather than at school, they were investigated. When students were identified, including the students who wrote graffiti on the bathroom walls, they were consequenced.

SUMMARY OF REASONS FOR DENYING THE WRIT

1) This is not a Title VII case. Sexual orientation is not a proscribed classification under Title VII. From time to time, the United States Congress has been asked to add sexual orientation to Title VII, but has refused to do so.

2) Title VII analysis does not apply to 42 U.S.C. §1983 sexual orientation claims. Neither the United States Congress, this Court, nor any federal circuit court of appeals has applied Title VII analysis to a claim for sexual orientation in the context of an equal protection lawsuit.

3) The United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit's analysis of the facts and equal protection law is correct. No reasonable jury could conclude that the respondents intentionally discriminated or acted with deliberate indifference toward Schroeder's situation because of his sexual orientation. At most, Schroeder makes a claim that the District administrators were negligent in the manner in which they responded to his complaints. Simple negligence cannot support a claim for denial of equal protection.

REASONS FOR DENYING THE WRIT

I. THE DECISION DENYING APPLICATION OF TITLE VII TO A SEXUAL ORIENTATION EQUAL PROTECTION CASE IS CORRECT.

A. This Is Not A Title VII Case.

Schroeder asks this Court to set aside precedent as well as congressional legislative prerogative and hold that Title VII analysis should apply to an equal protection claim based on sexual orientation as a suspect class. In short, Schroeder asks this Court to do what the United States Congress has refused to do and include sexual orientation as a proscribed category in employment discrimination claims. The Seventh Circuit cited *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 140

L. Ed. 2d 210, 118 S. Ct. 1003 (1998) for the mandate of separation of powers and stated:

> As such, to the extent Schroeder seeks to have this court judicially amend Title VII to provide for such a cause of action, we decline to do so. It is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit. App. 6a.

A detailed reading of Schroeder's expansive complaint, quickly reveals that a claim under Title VII is not pled in any respect. Rather, Schroeder exclusively bases his complaint upon the Equal Protection Clause of the Fourteenth Amendment made enforceable through 42 U.S.C. §1983. Indeed, throughout the petition, Schroeder correctly refers to his action as one for equal protection based on a hostile work environment because of his sexual orientation. (Petition p. 3). Despite the fact that the words "Title VII" appear no where in his complaint and pleadings, Schroeder continues to argue that the Seventh Circuit should have used a Title VII analysis in his case.

Federal anti-discrimination laws prohibit employment discrimination on the bases of race, religion, national origin, and sex (Title VII, 42 U.S.C. §2000e, et seq.), age (Age Discrimination in Employment Act, 29 U.S.C. §623(a)), and disability (Americans with Disabilities Act, 42 U.S.C. §12112), but not sexual orientation. Title VII does not explicitly define the term "sex". However, the courts have consistently read sex to mean gender, and rejected all attempts to extend Title VII's protection to sexual orientation. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000), cert. denied April 23, 2001; *Higgins v. New Balance*

Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999). Title VII does not proscribe harassment simply because of sexual orientation. *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751-52 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989).

There have been several proposals in the United States Congress to amend Title VII to include sexual orientation in the list of protected categories, but they have all failed. (See, for example, H.R. 2074, 96th Congress (1979); and H.R. 8269, 95th Congress (1977)). More recent legislative action in this area has focused on passage of the so-called Employment Non-Discrimination Act or ENDA. The ENDA seeks to extend federal anti-discrimination protection to gays and lesbians under a framework similar to that used in Title VII. ENDA was first introduced in the United States House of Representatives in 1994. (H.R. 4636, 103rd Congress (1994)). It apparently has been reintroduced at each subsequent Congressional session. To date, Congress has refused to pass it.

The respondents respectfully submit that the courts should not do what the United States Congress has refused to do, which is to include sexual orientation in a Title VII framework and analysis.

B. The Federal Courts Have Not Applied A Title VII Analysis In An Equal Protection Lawsuit Alleging Sexual Orientation.

In his petition to this Court, Schroeder asks the Court to apply Title VII employment discrimination standards to a §1983 equal protection case based on sexual orientation. The Seventh Circuit correctly rejected Schroeder's attempt

to apply Title VII analysis in a traditional equal protection analysis. App. P. 6a. In his petition, Schroeder continues to argue the incorrect inference that there is precedent for applying Title VII analysis in a §1983 employment discrimination case based on sexual orientation. Cases from other circuits upon which he relies do not support that inference.

Intent to discriminate is always an element to be proved under equal protection discrimination analysis. *Washington v. Davis,* 426 U.S. 229 (1976); *Massachusetts v. Feeney,* 442 U.S. 256 (1979). However, Schroeder is wrong when he says in his petition that intent to discriminate is always an element under Title VII. (Petition, p. 7).

Perhaps Schroeder is half right. Certainly, all claims for equal protection require intentional conduct by the defendant. Likewise, claims under Title VII for disparate treatment discrimination also require intentional conduct. That is, in a disparate treatment case, a plaintiff must prove discriminatory animus. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089 (1981); *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985). However, the same is not true of all Title VII cases. Schroeder oversimplifies Title VII law by applying the intentional act standard for quid pro quo sexual harassment to claims for hostile work environment discrimination. That is, it is undeniably the case that where a supervisor engages in quid pro quo sexual harassment, his or her actions must be intentional; that is, the very nature of a quid pro quo case by definition indicates that the intent of the plaintiff's supervisor to demand certain favors of her because of her sex requires that the supervisor's action evidence that intent. But Schroeder does not claim quid pro quo

sexual harassment or even quid pro quo sexual orientation harassment. He does not claim that his supervisors were the harassers. Rather, he claims that he was being harassed by mostly children, i.e., students, and perhaps by some unidentified staff members or parents. Therefore, he pleads a case for hostile work environment due to his sexual orientation.

Although the respondents have not contested as a matter of law that Schroeder may make such a claim under the equal protection clause of the 14th Amendment and §1983 (see *Nabozny*, supra, and *Romer*, infra), nonetheless, the equal protection claim brings with it the intentional standard of proof. ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identified group." *Massachusetts v. Feeney*, at p. 279).

Certainly, Title VII jurisprudence recognizes a hostile work environment claim for sexual harassment. *Meritor Savings Bank v. Vincent*, 477 U.S. 57 (1986); *Harris v. Forklift Systems*, 114 S.Ct. 367 (1993). Of course, one element of such claim is that plaintiff be a member of a protected class, that is, based on sex. It is clear that Title VII recognizes no claim for hostile work environment based on sexual orientation.

However, in the sexual harassment hostile work environment context, the negligence of the employer is the most common theory of recovery. See Lindemann & Grossman, *Employment Discrimination Law*, 3rd Ed., Vol. I at p. 814. Indeed, Judge D. Wood in her dissent in this

case recognized as much where she cited three recent 7th Circuit cases "all recognizing that an employer is only liable under Title VII for co-worker harassment if it is negligent . . . " App. P. 22a. Therefore, if the court were to apply Title VII hostile work environment analysis to this equal protection case, it would be eviscerating the long-standing standard of intentional action proof required to support a violation of the equal protection clause of the 14th Amendment.

As noted, this difference in proof in employer negligence standard and hostile work environment cases was correctly recognized by the majority of the 7th Circuit as well as by Judge D. Wood in her dissent. It is also very telling that not even Judge Wood in her dissent accepts Schroeder's invitation to graft a Title VII analysis onto this equal protection case.

The cases relied upon by Schroeder in his petition could have been brought solely as a Title VII case. That is, the Title VII claim could have stood independent of the equal protection claim brought under §1983. That is not the situation in the case now before the Court. Moreover, the cases relied upon by Schroeder were disparate treatment cases where the intentional standard of proof is applied. In *Wallace v. Texas Tech University*, 80 F.3d 1042 (5th Cir. 1996), an African-American basketball coach failed to establish race discrimination played a role in the refusal to renew his contract, disparate treatment in failing to renew contract; *Harris v. Shelby County Board of Education*, 99 F.3d 1078 (11th Cir. 1996), disparate treatment in failing to promote plaintiff to school principal because of his race; *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986), disparate treatment in promotion, transfer, discharge, and terms and conditions of employment

based on race and sex; *Briggs v. Anderson,* 796 F.2d 1009 (8th Cir. 1986), disparate treatment claim under Title VII for intention to deny a promotion based on sex and race. Finally, *Weberg v. Franks*, 229 F.2d 514 (6th Cir. 2000), is perhaps most illustrative of this point. There, plaintiff claimed reverse race discrimination under §1983 and the court did note that under such an equal protection claim, the plaintiff must show that the employer made its adverse employment decision with a discriminatory intent. The Sixth Circuit went on to note in that part of its decision under the heading "Disparate Treatment" that courts will look to Title VII disparate treatment cases for assistance in analyzing race discrimination in public employment context under §1983. *Id.*, p. 522. That is so because as we have already seen disparate treatment and §1983 have the intention to discriminate requirement. However, later in the opinion under the heading "Disparate Impact", the Sixth Circuit dismissed the disparate impact claim in two sentences holding that "mere disparate impact is not sufficient to state an equal protection claim under §1983." *Id.*, p. 528. This is so because a disparate impact claim is more akin to a negligent standard of proof. Therefore, the cases relied upon by Schroeder are easily distinguishable from this matter and in fact support the proposition where the discriminatory employment claim is for disparate impact or hostile work environment, the Title VII proof or analysis does not lend itself to an equal protection claim under §1983.

In this case, the underlying facts clearly do not support both a Title VII and a constitutional deprivation claim. Schroeder's claim for sexual orientation discrimination must fail under Title VII. Therefore, since his only claim is a constitutional deprivation claim for denial of

equal protection, he should not be allowed to avail himself of the Title VII analysis in the §1983 context.

In addition, unlike Title VII, §1983 permits suit against individual state actors in their official and/or individual capacities. Indeed, Schroeder sued individuals in this case in addition to his former employer, the Hamilton School District. Title VII does not permit suit against individuals, even if those individuals acted as Schroeder's supervisors or managers. Only the employer may be sued in a Title VII case. *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *United States EEOC v. AIC Security Investigations Limited*, 55 F.3d 1276 (7th Cir. 1995). Therefore, to apply Title VII analysis to the respondents in this case would not only expand Title VII to a class of employee-plaintiffs not intended by Congress, but would also apply Title VII analysis to defendant-individuals whom Congress and the courts have set outside the scope of Title VII.

II. THE SEVENTH CIRCUIT'S DECISION IS IN HARMONY WITH THE FEDERAL CIRCUITS AND THIS COURT'S DECISIONS REGARDING EQUAL PROTECTION.

A. The Seventh Circuit Decision Is Consistent With Established Equal Protection Law.

In order to reach trial on an equal protection claim, the petitioner must provide evidence showing that the defendants (1) treated him differently from others who were similarly situated; and (2) intentionally treated him differently because of his membership in the class to which he belonged; and (3) because homosexuals do not enjoy any heightened protection under the Constitution, that the

discriminatory intent was not rationally related to a legitimate state interest. App. 6a-7a, citing *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996); *Hedrich v. Bd. Of Regents*, 274 F.3d 1174, 1183 (7th Cir. 1996).

These requirements are stated in the conjunctive. All three must be satisfied by Schroeder. ("The District Court's decision to grant the defendants' motion for summary judgment of this claim must be sustained if the defendants demonstrate that they did not deny Schroeder equal protection on account of his sexual orientation, *or* that they had a 'rational basis' for doing so." App. 7a (emphasis added)). Although Schroeder's claim fails on all three points (as noted by Judge Posner in his concurrence), nonetheless, it is sufficient to affirm the District Court to find that this record does not support a claim of intentional discrimination against Schroeder because he is gay. At most, Schroeder's claim has the shadow of a negligence action, i.e., he and perhaps others might disagree on the manner and magnitude that students were consequenced. Nonetheless, to say that others might have done things differently is to fall woefully short of making out a case of intentional discrimination.

Relying on *Nabozny* and other cases, the Seventh Circuit correctly identified the question in this case as not whether the respondents sufficiently promoted a positive attitude toward homosexuality in the school environment, but rather whether the manner in which they handled petitioner's complaints of harassment denied him equal protection of the law. The District Court and the Seventh Circuit opinions found that there is no evidence upon which a reasonable jury could find that the respondents were deliberately indifferent to Schroeder's situation. App., p. 46a; App. 14a-15a. To the contrary, the District

Court and the Seventh Circuit note that upon this record, the school district has shown that it was genuinely concerned about Schroeder's treatment and acted appropriately under the circumstances. App. 14a.

In coming to this conclusion, the District Court and the Seventh Circuit noted that the record here is replete with memoranda, correspondence and testimony about how the respondents responded to Schroeder's requests and complaints. Therefore, the District Court and the Seventh Circuit were correct in finding that no reasonable jury could find that Schroeder would be able to satisfy the elements of an equal protection claim.

B. The Seventh Circuit Opinion Is Not In Conflict With *Romer v. Evans*.

Nowhere in its opinion does the Seventh Circuit "rank" groups in order of priority. The Seventh Circuit opinion does not in any way suggest that African-Americans or any other race are entitled to more equal protection than a woman. However, this Court and every federal circuit Court of Appeals, have recognized that some groups have been given the label "suspect class" and are entitled to a higher level of scrutiny when their status is a factor under an equal protection analysis.

This Court has not included sexual orientation in the list of suspect classes. To the contrary, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court operated on the understanding that sexual orientation is not a suspect class. (See, *Romer*, *Scalia* dissent, footnote 1.) Several federal circuit Courts of Appeals have also ruled that rational basis review is appropriate where sexual orientation is involved. *Jantz v. Muchi*, 976 F.2d 623, 630 (10th Cir.

1992), cert. denied, 508 U.S. 952 (1993); *High Tech Gaze v. Defense Industry Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); and *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

A fair reading of the majority opinion does not indicate a ranking among suspect classes or even between suspect classes and non-suspect classes. Rather, the Seventh Circuit simply recognizes the commonsense reality that it is not irrational to prioritize activities, even when those activities involve responding to complaints, concerns or problems of certain identifiable groups. As Judge Posner noted, this is not to say that homosexuals are "constitutional outlaws." Concurring opinion, App. 17a. Indeed, the District's response to Schroeder's treatment was not motivated by hostility to homosexuals. Schroeder presents no evidence from which a reasonable jury could infer intentional discrimination, that is, that these respondents were purposely hostile to him because he is homosexual. In an attempt to refute that conclusion by the District Court, the Seventh Circuit noted that Schroeder set up "a false dichotomy – i.e., disparity of treatment/protection given to blacks/women as compared with homosexuals. In reality, these examples merely demonstrate the school district's priorities for use of time and resources in favor of its students." App. 8a-9a.

The magnitude of the response in absolute terms is not a measure of deliberate indifference. The Seventh Circuit does no more than recognize this principle and, as applied to Schroeder's situation, finds that the District dealt with it appropriately given the source of the harassment

(often anonymous), what was known or not known of the harassers, and the prevalence or total lack thereof of other similarly situated teachers. At no time does the Seventh Circuit hold that Schroeder's situation fell outside the protections which the Constitution afforded him. Rather, the Seventh Circuit recognizes that those protections were appropriate to the situation facing the school district and Schroeder in this case. The District's response was rational. *Irizarry v. Chicago Bd. Of Ed.*, 251 F.3d 604, 610 (7th Cir. 2001), citing *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) and other cases.

The petitioner totally misses the point when he argues that the District "allow[ed] Schroeder to be harassed and abused because they could not afford to protect him." (Petition, p. 12). This assertion stumbles on its own premise. The District Court and the Seventh Circuit found no evidence that the District *allowed* Schroeder to be harassed and abused. To the contrary, "[t]he record is replete with memos, correspondence, and testimony indicating that various administrators and staff positively responded to his requests." App. 14a-15a. Here, these respondents did not use limited resources to intentionally discriminate against Schroeder because he is gay. Rather, as the District Court and the Seventh Circuit held, the District did not treat him differently in the first place. ("There is no evidence that the defendants were deliberately indifferent to his situation, or that they did not make a sincere effort to deal with his complaints." App. 14a-15a).

Saenz v. Roe, 526 U.S. 489 (1999), has no application here. That case was decided on the Citizenship Clause of the 14th Amendment holding that the clause does not tolerate subclasses of similarly situated citizens based on location of their prior residence. It has nothing to do with

hostile work environment employment discrimination or the equal protection clause. It is fairly limited to its facts and certainly does not hold that a municipality can never use saving money as a rational justification for its action. Moreover, the result in Schroeder's case would be the same since the District never allowed Schroeder to be harassed in the first instance.

In *Wayte v. United States*, 470 U.S. 598 (1985), this Court elaborated on the confines of the selective enforcement defense. In *Wayte*, the defendant was indicted for failure to register with the selective service system. He moved to dismiss the indictment, claiming that the selective service's policy of investigating and referring for prosecution only those who were "vocal" opponents of the registration program violated the guarantee of equal protection. *Id.* at 604. This Court found it "appropriate to judge selective prosecution claims according to ordinary equal protection standards", *id.* at 608, and reiterated the proposition that the defendant must demonstrate that the government official was motivated by an intent to discriminate based upon an illegitimate group characteristic. *Id.* at 608-609.

Likewise, in order to prevail here, Schroeder must demonstrate that the District was motivated by an intent to discriminate against him based upon his homosexuality. As previously noted, he totally fails in that proof. The District's response was rational.

III. NO REASONABLE JURY COULD FIND IN FAVOR OF SCHROEDER.

As already pointed out, the District Court and the Seventh Circuit meticulously reviewed the record in this

case; and each concluded on this record that Schroeder failed to present evidence from which a reasonable jury could find intentional or purposeful discrimination because Schroeder is gay and summary judgment was granted for respondents.

> The gravaman of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. The plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group. *Nabozny* at pp. 453-54 (citation omitted).

Clearly, in this matter, Schroeder has failed to produce any evidence of intentional discrimination on the part of the District or on the part of any of the individual respondents. Moreover, the testimony of all witnesses reveals that the complaints of Schroeder were not treated with any level of indifference, deliberate or otherwise. When Schroeder reported incidents, including telephone calls that he received at his home rather than at the school, they were investigated. When students were identified, including the students who wrote graffiti on the bathroom walls, they were reprimanded and disciplined. There is no evidence that demonstrates an intentional or purposeful discrimination to show an equal protection violation.

CONCLUSION

Accordingly, Respondents respectfully request that Schroeder's petition for writ of certiorari be denied.

Respectfully submitted,

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